Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1997

J & E SALVAGE COMPANY, JOHN DARLINGTON and THERESA N. DARLINGTON, Executrix of the Estate of EDWARD DARLINGTON,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether or not the decision of the United States Court of Appeals for the Federal Circuit that petitioner failed to state a claim upon which relief could be granted growing out of the taking by the federal government of helicopter transmissions having a value of $1,150,600 under color of an order rendered by a Federal District Court lacking subject matter jurisdiction involves an important question of federal law that has not been but should be settled by the United States Supreme Court.

2. Whether or not the decision of the United States Court of Appeals for the Federal Circuit is in conflict with the decision of the United States Court of Appeals for the Ninth Circuit in *United States v. Jones*, 176 F.2d 278 (9th Cir. 1949).

3. Whether or not the United States Court of Appeals for the Federal Circuit failed to properly construe 40 U.S.C. § 484(d).

STATEMENT PURSUANT TO RULE 29.6

Pursuant to Rule 29.6 Petitioners, John Darlington, and Teresa N. Darlington, Executrix of the Estate of Edward Darlington, are general partners in J & E Salvage Company. J & E Salvage Company, located in Jacksonville, North Carolina, has no parents or subsidiaries (other than those that are wholly owned).

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Petitioners, J & E Salvage, *et al.*, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is unpublished and is reproduced in the appendix filed herein at 1a.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Federal Circuit entered its judgment on March 25, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part: "nor shall private property be taken for public use without just compensation."

40 U.S.C. § 484(d) provides:

> A deed, bill of sale, lease, or other instrument executed by or on behalf of any executive agency purporting to transfer title or any other interest in surplus property under this sub chapter shall be conclusive evidence of compliance with provisions of this sub chapter insofar as concerns title or other interest of any bona fide grantee or transferee for value and without notice of lack of such compliance.

STATEMENT OF THE CASE

Petitioners John Darlington and Theresa Darlington, executrix of the Estate of Edward Darlington, are general partners in J & E Salvage Company (hereinafter referred to as J & E), located in Jacksonville, North Carolina. On May 19, 1992, John and Edward Darlington attended an auction held by the Defense Reutilization and Marketing Office (hereinafter referred to as DRMO) at Cherry Point, North Carolina for the sale of certain surplus materials discarded by the United States Department of Defense. At the sale, J & E purchased Lot Numbers 42 through 47, which appeared to be large containers used for shipping and storing helicopter transmissions. Since the containers were bolted shut at the time of the sale and J & E was not allowed to inspect the contents of the containers, they were unable to determine what, if anything, was inside the containers. The lots were described in the Invitation for Bids and the Notice of Award as "Shipping and Storage container: 2 EA." It is important to note that the containers were not described as "Containers (empty)" which is frequently the manner in which DRMO describes empty containers. It is not unusual in the government surplus trade to learn that merchandise described as "containers" turns out to be containers with other property in them. J & E paid a total of $1,075 for the "lots" of property.

After paying for the merchandise, J & E transferred the property back to its place of business. Sometime thereafter, the containers were opened and it was discovered that four of them contained surplus helicopter transmissions which were valued at $289,600 each. As was the custom in the trade when undescribed merchandise was discovered in a lot bought from the government, J & E called DRMO and told it that J & E had the transmissions. DRMO demanded that J & E return the transmissions. Standing upon the custom in the trade regarding

the buying of government merchandise, J & E refused to return the transmissions, claiming that they were the property of J & E.

Several months later, the United States of America filed suit against J & E in the United States District Court, Eastern District of North Carolina, seeking the return of the transmissions and asking for damages. In due course, J & E responded that the District Court lacked subject matter jurisdiction, arguing that the dispute was governed by the Contract Disputes Act, 41 U.S.C. §§ 601-613. The District Court held that it had jurisdiction and ordered J & E to return the transmissions to the government. *United States v. J & E Salvage Co.*, No. 92-162-CIV-4-H (E.D.N.C. August 19, 1994). J & E complied with the order of the District Court and returned the transmissions on September 9, 1994. J & E then appealed the District Court's decision to the United States Court of Appeals for the Fourth Circuit, which reversed the District Court on the question of subject matter jurisdiction and remanded with instructions to grant J & E's motion to dismiss. *United States v. J & E Salvage Co.*, 55 F.3d 985, 990 (4th Cir. 1995).

On August 3, 1995, J & E sent a letter to G. Norman Acker, III, an Assistant United States Attorney for the Eastern District of North Carolina, demanding that the government return the transmissions in light of the Fourth Circuit's decision. Mr. Acker referred J & E's letter to counsel for DRMO. On September 5, 1995 in a document titled "Finding of Fact and Final Decision," Dan Hurston, a contracting officer with DRMO, denied J & E's request for return of the transmissions. In so doing, Mr. Hurston stated that "legal title of the CH-46 transmissions did not transfer to J & E Salvage as a result of the sale of the shipping and storage containers."

J & E then filed suit in the United States Court of Federal Claims seeking compensation for the transmissions on the ground that the taking of the transmissions under color of an order issued by a federal court which lacked subject matter jurisdiction and the subsequent refusal of the United States to return the transmissions on demand amounted to a Fifth Amendment taking. The Court of Federal Claims granted the government's motion to dismiss for failure to state a claim upon which relief could be granted, saying that: (1) contractually-based property rights generally do not give rise to taking claims; (2) in the Cherry Point auction, the government was acting in its propriety capacity rather than in its sovereign capacity; and (3) the purchase contract had not been fully performed and therefore ownership of the transmissions had not vested in J & E. *J & E Salvage Co. v. United States*, 36 Fed. Cl. 192, 196 (1996). J & E subsequently amended its complaint to allege breach of contract, which was also dismissed for failure to state a claim upon which relief can be granted. *J & E. Salvage Co. v. United States*, 37 Fed. Cl. 256 (1997).

On appeal to the United States Court of Appeals for the Federal Circuit, on the taking issue, the Federal Circuit affirmed the decision of the Court of Federal Claims, but used a different rationale for affirming the decision of the Court of Federal Claims than that court had used in issuing its ruling. The Federal Circuit based its decision on the premise that "J & E never acquired a compensable property interest in the helicopter transmissions because the transmissions were never part of the subject matter of the contract." *J & E Salvage Co. v. United States*, No. 97-5066, App. at 5a.

Petitioners argued that under 40 U.S.C. § 484(d) when a purchaser buys government surplus, insofar as his title is concerned, everything required to be done by government agents in selling the merchandise is deemed to have been done,

regardless of whether it was actually done or not. Petitioners pointed out that this clear reading of 40 U.S.C. § 484(d) had most recently been held to be the proper one by the District Court of the District of Columbia in *Pacific Harbor Capitol v. Dept. of Agric.*, 845 F. Supp. 1 (D.D.C. 1993). J & E showed that the DRMO manual provided for several procedures to be performed which ensured that property was not mistakenly included in containers which were to be sold. Therefore, since it is conclusively presumed pursuant to 40 U.S.C. § 484(d) that these procedures were performed, there could have been no mistake or inadvertence in including the transmissions in the containers. Moreover, since the DRMO manual required that an accurate description of the property be made, under 40 U.S.C. § 484(d) the only choice for the court was to conclude, for the purposes of whether or not petitioners had title to the transmissions, was that describing the property as "shipping containers" was the proper way to describe containers with transmissions in them.

The Federal Circuit never directly addressed this argument. Rather than dealing with the argument, the court simply said:

> In this case, the helicopter transmissions were never part of the sales contract and thus §484(d) is inapplicable. It is clear from the plain language of §484(d) that the conclusive presumption regarding title only applies to the property which the instrument purports to transfer. Here the contract documents only purported to transfer an interest in the storage containers. *J & E Salvage Co. v. United States*, No. 97-5066 App. at 8a.

In support of petitioners' reading of 40 U.S.C. § 484(d), they showed the Federal Circuit that it has long been the law that 40 U.S.C. § 484(d) prevents the government from

challenging the sale of surplus goods based on claims of lack of authority or mistake, citing *United States v. Jones*, 176 F.2d 278 (9th Cir. 1949). The Federal Circuit attempted to distinguish *Jones* by saying that the government had contracted to sell universal gear joints in that case; overlooking the fact that in *Jones* the government thought it was selling automotive universal gear joints which had a minimal value (the amount paid was computed to be $69.13), when in fact it was selling marine universal gear joints having a retail value of $62,533.45. *Jones*, 176 F.2d at 283. The Federal Circuit held that the holding in *Jones* did not apply to this case because, "The conclusive presumption regarding title only applies to the property which the instrument purports to transfer." *J & E Salvage Co. v. United States*, No. 97-5066, App. at 8a.

Furthermore, the petitioners showed that in a case involving facts virtually identical to those in this case, the Armed Services Board of Contract Appeals refused to allow the government to reclaim infrared missile heads that had been sold in lots described as: "Containers, Shipping: Drums, various sizes." *Appeal of John T. Gonsalves*, ASBCA No. 31874 (Mar. 10, 1986). In that case the board stated:

> Doubtless the Navy knew the missile heads and parts were within the drums, whether or not the Navy conveyed this information to the DPDS (Defense Property Disposal Service). Repeatedly respondent requests that we strictly construe the provisions of their surplus sales contracts. Respondent cannot now ask us to set aside a final sale to correct a mistake it made.

The Court of Appeals said that it did not find the reasoning of the Armed Services Board of Contract Appeals to be persuasive. The Court said that the Board "failed to analyze the fundamental

question of whether the missile heads were within the scope of the contract." *J & E Salvage Co. v. United States*, No. 97-5066, App. at 10a.

J & E further argued that under the "GENERAL SALE TERMS AND CONDITIONS" part of the contract, under the heading "CONDITION AND LOCATION OF PROPERTY," that the government said:

> Unless otherwise provided in the Invitation, all property listed therein is offered for sale "as is" and "where is." Unless otherwise provided in the Invitation, the Government makes no warranty, express or implied, as to quantity, kind, character, quality, weight, size, or description of any of the property, or its fitness for any use or purpose.

The Federal Circuit, without discussion, pronounced that the government's warranty disclaimer did not help J & E:

> The disclaimer simply precluded the purchaser from alleging a breach of contract if the goods failed to accurately match their description. This provision did not preclude the government from recovering possession of merchandise inadvertently contained within the goods actually sold. *J & E Salvage Co. v. United States*, No 97-5066 App. at 6a.

The court did not cite any evidence in the record that the transmissions were in the containers through "inadvertence." The record is totally devoid of any such evidence.

REASONS FOR GRANTING THE WRIT

Given the vast quantity of property which is utilized and subsequently discarded by the government of the United States, Congress made the decision to include 40 U.S.C. § 484(d) in the Federal Property Administrative Services Act of 1949 (hereinafter referred to as FPASA) as it had included a virtually identical provision in the Surplus Property Act of 1944 (hereinafter referred to as SPA).[1] 40 U.S.C. § 484(d) reads:

> A deed, bill of sale, lease, or other instrument executed by or on behalf of any executive agency purporting to transfer title or any other interest in surplus property under this sub chapter shall be conclusive evidence of compliance with the provisions of this sub chapter insofar as concerns title or other interest of any bona fide grantee or transferee for value and without notice of lack of such compliance.

The seminal case interpreting § 25 of the SPA (and thus 40 U.S.C. § 484(d)) is *United States v. Jones*, 176 F.2d 278 (9th Cir. 1949). In *Jones*, the purchaser paid $69.13 for universal gear joints which had a value in excess of $60,000. The government agents who sold the property had been unaware that the gear joints were maritime equipment, mistaking them for automotive equipment. Given the inequitable difference between the price paid and the actual value of the property, and

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1. Whereas § 25 of the Surplus Property Act protected title to "property" sold under the act as opposed to "surplus property" in the FPASA, it had been held that the addition of the word "surplus" was not intended in any way to limit the scope of the protection of the purchaser's title. *Pacific Harbor Capitol v. Dept. of Agric., supra* 845 F. Supp. at 5. The government offered no evidence that the transmissions in question here were not in fact surplus property.

the mistake of the government as to what it had sold, the court held that a recission of the transaction would be called for in an ordinary commercial transaction. *Jones*, 176 F.2d at 288. Nevertheless, the Ninth Circuit held that § 25 of the SPA, "has made the sale to Jones immune against an attack based on lack of authority or mistake." *Id.* The government did not seek review of the decision in *Jones* in this court, and its broad holding has governed the field of surplus sales for the past half century.

For example, in *Pacific Harbor Capitol v. Dept. of Agric.*, *supra*, which was not discussed by the Federal Circuit, the Forest Service obtained historic airplanes from the Department of Defense for the purpose of trading them for non-historic airplanes owned by a company called TMB Inc. *Pacific Harbor Capitol*, 845 F. Supp. at 2. The Forest Service's trading of the planes was in violation of the applicable regulations because it was plainly illegal for them to trade historic airplanes for non-historic airplanes and, furthermore, it was not legal for them to obtain planes from the Department of Defense for the purpose of exchanging them, or to dispose of them in any event without using them for one year. *id* Moreover, the planes had never been determined to be "surplus," as required by 40 U.S.C. § 472. *id.* at 2-3.

In *Pacific Harbor*, the court held that the bills of sale on which the plaintiff relied were conclusive evidence, as it concerned plaintiff's, title that the General Services Administration declared the property surplus in compliance with the FPASA, even if the General Services Administration had not done so. *id* at 4. Similarly, the bills of sale were conclusive evidence, insofar as plaintiff's title was concerned, that the defendants had complied with all the provisions and regulations under sub chapter 2 of the FPASA regarding the transfer of government property, including the regulations regarding historic exchanges that the forest service had clearly violated. *id* at 2.

Thus, we have two holdings, one by the Ninth Circuit, for which the government did not seek review in this court, and another by the District Court of the District of Columbia which the United States did not appeal, in which courts held that in the area of marketing surplus the government will not be heard to say that it made a mistake in selling property which it sold, even where the facts clearly showed that it had made a mistake. The Eastern District of Tennessee held similarly in *East Tennessee Iron and Metal Co. v. United States*, 218 F. Supp. 377 (1963), which the government did not appeal, as did the United States Court of Claims in *Turney v. United States*, 115 F. Supp. 457 (Cl. Ct. 1953), which was also not appealed. The decision of the Armed Services Board of Contract Appeals in *Appeal of John T. Gonsalves*, *supra*, while not explicitly mentioning 40 U.S.C. § 484(d), reflects the principle that the government will not be heard to say that it made a mistake in selling surplus property. Petitioners submit that this principle has become so embedded in the law of government surplus that the Board of Contract Appeals did not believe it to be necessary to provide an analysis of the source of the rule. Moreover, the government did not appeal the ruling in *Gonsalves*.

The plain language of 40 U.S.C. § 484(d) supports petitioners' claim to title of the transmissions. It is undisputed that petitioners have a "Notice of Award" for lot numbers 42 through 47 of the property sold at the Cherry Point, North Carolina auction held on May 19, 1992. The Notice of Award was executed on behalf of the Department of Defense, an executive agency. Thus it constitutes conclusive evidence, *i.e.* an irrebuttable presumption, that the provisions of Sub Chapter II of Chapter 10 of Title 40 of the United States code were complied with. The DRMO manual is a compilation of regulations promulgated by the Department of Defense pursuant to Sub Chapter I, of Chapter 10 of Title 40 of the United States

Code. See DRMO Manual II. A. 1. If the provisions of the DRMO manual are complied with it is impossible for material to be sold "inadvertently" or through mistake. If 40 U.S.C. § 484(d) has any meaning at all, it clearly means that this court must conclude that everything that the manual says must be done, was done in the case of the property purchased by petitioners on May 21, 1992. Thus, when the containers were received by DRMO they were inspected upon receipt and the property description was verified. DRMO Manual VI. G. 2. b. Under that same provision, if a discrepancy existed, the discrepancy was sent to the Generating Activity within five working days from receipt of the property and the discrepancy was resolved. Had the discrepancy not been resolved within a reasonable time, the shipment would have been returned. Furthermore, if the containers had been thought to be empty rather than containing transmissions, there would have been a signed certificate, certifying the containers to be empty as required by DRMO Manual VII. D. 22. g.[2]

In addition, as petitioners have pointed out *supra* at p. 7, under the General Sales Terms and Conditions, petitioners bought the property here "as is/where is." As petitioners pointed out by affidavit in the courts below, "as is/where is" is the watch word of the condition and description of property in government surplus sales. The government makes "no warranty, express or implied, as to quantity, kind, character, quality, weight, size, or *description* of any of the property, or its fitness for any use or purpose." General Sales Terms and Conditions paragraph 2 (emphasis added). The Federal Circuit said that this provision innured solely to the benefit of the government and in no way protected the purchaser. In other words "heads, we win and tails, you lose." But, such a position is clearly

2. As petitioners showed in the court below, DRMO frequently describes empty containers as "CONTAINERS (empty)." when it wishes to indicate that it is selling empty containers.

unjust and inequitable. For example, had the purchasers discovered transmissions which were worthless in the containers, and did not wish to undertake the task of disposing of over a ton of valueless material, they could not have taken the transmissions back to DRMO for DRMO to deal with the problem, DRMO would have said "You bought them 'as is where is' We did not guarantee that the containers were empty."

Furthermore, as the situation now stands under the Federal Circuit's ruling, every purchaser of government surplus who finds material not described among his property is faced with a difficult problem. Must he take the undescribed material back to DRMO at his expense, or risk administrative and legal proceedings for retention of property which the government says still belongs to it. Does DRMO have the option of saying that it wants the property back if the property is desirable or, on the other hand, saying that getting rid of the property is the purchaser's problem if the property is undesirable. Under the Federal Circuit's holding the terms of the sale are "as is/where is if the government wishes it to be so". Just as 40 U.S.C. § 484(d) in effect now reads, in pertinent part, "in surplus property *particularly described by the bill of sale.*"

In addition to the foregoing analysis which supports petitioners' position in this case, there is a very practical scenario for explaining why the property bought by the petitioners was described in the manner that it was described and no inspection of the insides of the containers was permitted prior to the sale. At the time that the transmissions which petitioners bought went out of service in the mid 1980s, it was contemplated that the CH-46 helicopter which used the transmissions would be replaced by the V22-Osprey by 1990. Had the Osprey not had the problems which prevented it from coming into service, the transmissions here would have been valueless by the time they were sold. Thus, it would not have been unreasonable to assume

that empty containers would have been more valuable and desirable than containers which held useless and very heavy transmissions which would have required some kind of disposal. In the courts below, petitioners introduced a copy of an article from Aviation Week and Space Technology dated February 9, 1990, documenting the problems with the V22-Osprey and the consequent plans to refurbish the CH-46. This possibility was never discussed by either court and petitioners were not allowed to conduct any discovery whatsoever on this theory.

More than thirty-five years ago, the Second Circuit said of government surplus sales:

> By way of preliminary it is to be noted that this is no ordinary contract between buyer and seller for the purchase and sale of a valuable commodity. When the government sells surplus goods it is trying to dispose of a vast miscellany of used and unused property in an effort, so far as may under the circumstances be possible, to minimize its loss. Sales of this character are processed on a mass quantity basis by members of the armed forces who seldom if ever have any expertise in the particular items which come to their warehouses and depots. Buyers of such surplus property know perfectly well that there is always the chance of buying property that may turn out to be of little value, or may develop into a great bargain with a huge windfall of profit. *Dardourian Export Corp. v. United States*, 291 F.2d 178, 182 (2nd Cir. 1961).

Thus, if petitioners seek a windfall in this case, it is a bargained-for windfall. The possibility of obtaining a windfall is one of the long recognized attractions of buying at surplus auctions.

But, if this Court does not correct the situation as it exists in this case, it will countenance the actions of the government in flouting the provisions of the Contract Disputes Act, seizing the property of the petitioners under color of a void order issued by a court without jurisdiction, and refusing to restore the status quo after the lawlessness of its action had been declared. If the decision of the Court of Appeals for the Federal Circuit is allowed to stand, the government will be allowed to assert in any case that it chooses that the property it sold was sold "inadvertently" or by mistake, and title to that property will never be secure, because no limitation is contained in the statute. *See United States v. Jones*, *supra*, 176 F.2d at 289. Thus, the desirability of government surplus property and its value will be diminished. The intent of Congress "to provide for the government an economical and efficient system for. . . . (c) the disposal of surplus property . . ." will be thwarted. 40 U.S.C. § 471. Furthermore, the petitioners will have been cheated out of $1,158,400 in violation of the Fifth Amendment.

This is surely a case where the Federal Circuit has entered a decision in conflict with the decisions of the Ninth Circuit Court of Appeals in *United States v. Jones*, *supra*. It is also the case where the Federal Circuit has decided an important question of Federal law that has not been, but should be decided by this court. Petitioner prays that this court will issue its writ of certiorari to the United States Court of Appeals for the Federal Circuit to review its decision in the case below.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT DECIDED MARCH 25, 1998

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

97-5066

J & E SALVAGE COMPANY, JOHN DARLINGTON, and TERESA N. DARLINGTON, Executrix of the Estate of EDWARD DARLINGTON,

Plaintiffs-Appellants,

v.

THE UNITED STATES,

Defendant-Appellee.

DECIDED: March 25, 1998

Before RICH, MICHEL, and SCHALL, *Circuit Judges.*

SCHALL, *Circuit Judge.*

DECISION

J&E Salvage Company and the other named plaintiffs (collectively J&E) appeal the judgment of the United States Court of Federal Claims (i) dismissing J&E's Fifth Amendment taking claim for failure to state a claim upon which relief could be granted, *J&E Salvage Co. v. United States*, 36 Fed. Cl. 192, 196 (1996) (*J&E III*), and (ii) dismissing J&E's breach of contract claim for lack of jurisdiction, *J&E Salvage Co. v. United States*, 37 Fed. Cl. 256, 260-63 (1997) (*J&E IV*). We *affirm.*

Appendix A

DISCUSSION

I.

On May 19, 1992, at the request of the Department of Defense, the Defense Reutilization and Marketing Office (DRMO) held an auction at Cherry Point, North Carolina, to sell surplus material. *See J&E III*, 36 Fed. Cl. at 193. John and Teresa Darlington, as general partners of J&E, purchased several "lots" of surplus merchandise at the auction. Specifically, J&E purchased lots 42 through 47, which appeared to be large containers used for shipping and storing helicopter transmissions. The containers were bolted shut at the time of the sale, so J&E was unable to determine what, if anything, was inside the containers. The lots were described in the invitation for Bids and the Notice of Award as: "Shipping & Storage Container: 2 EA." J&E paid a total of $1,075 for the containers.

After J&E paid for the merchandise, it transported the containers back to its place of business. Sometime thereafter, the containers were opened and it was discovered that four of them contained surplus helicopter transmissions valued at $289,600 each. When J&E notified DRMO of this discovery, DRMO claimed that the transmissions were still government property and demanded their immediate return. J&E, however, refused to return the transmissions. DRMO then filed suit in the United States District Court for the Eastern District of North Carolina seeking a return of the transmissions. In due course, J&E filed a motion to dismiss for lack of jurisdiction, arguing that the dispute was governed by the Contract Disputes Act, 41 U.S.C. §§ 601-613 (1994) (CDA), and that the district court therefore was without subject matter jurisdiction.

Rejecting J&E's argument, the district court held that it had jurisdiction and ordered J&E to return the transmissions to the government. *See United States v. J&E Salvage Co.*, No. 92-162-CIV-4-H (E.D.N.C. Aug. 19, 1994) (*J&E I*), *rev'd*, 55 F.3d 985 (4th Cir. 1995). J&E complied with the court's order and returned the transmissions on September 9, 1994. However, J&E appealed the district court's decision to the United States Court of Appeals for the Fourth Circuit. On June 14, 1995, the Fourth Circuit reversed the district court on the jurisdictional issue and remanded with instructions to grant J&E's motion to dismiss. *See United States v. J&E Salvage Co.*, 55 F.3d 985, 990 (4th Cir. 1995) (*J&E II*).

On August 3, 1995, J&E sent a letter to G. Norman Acker, III, an Assistant United States Attorney for the Eastern District of North Carolina, requesting that the government return the transmissions in light of the Fourth Circuit's decision. Mr. Acker referred J&E's letter to counsel for DRMO. Thereafter, on September 5, 1995, in a document titled "FINDING OF FACT AND FINAL DECISION," Dan Hurston, DRMO's contracting officer, denied J&E's request for return of the helicopter transmissions. In so doing, Mr. Hurston stated that "legal title of the CH-46 transmissions did not transfer to J&E Salvage as a result of the sale of the shipping and storage containers."

Subsequently, J&E filed suit in the Court of Federal Claims seeking compensation for the transmissions on the ground that DRMO's refusal to return them amounted to a Fifth Amendment taking. The government moved to dismiss the complaint for failure to state a claim upon which relief could be granted. The trial court agreed and held, for various reasons, that J&E had failed to state a Fifth Amendment taking claim. *See J&E III*, 36 Fed. Cl. at 194-96. However, instead of granting the

government's motion to dismiss, the court allowed J&E to amend its complaint to allege a breach of contract. *See id.* Eventually, the government moved to dismiss the breach of contract claim for lack of subject matter jurisdiction. In *J&E IV*, the court granted the government's motion on the ground that J&E had failed to submit a valid and certified claim to the contracting officer as required by the CDA. *See* 37 Fed. Cl. at 260-63. In the alternative, the court held that even if it had jurisdiction over the breach of contract claim, J&E would lose on the merits. *See id.* at 263-66.

II.

Whether a motion to dismiss for lack of jurisdiction has been properly granted is a question of law which we review *de novo. See Gould, Inc. v. United States*, 67 F.3d 925, 928 (Fed. Cir. 1995). Similarly, whether a complaint has been properly dismissed for failure to state a claim upon which relief may be granted is also a question of law which we review *de novo. See Dehne v. United States*, 970 F.2d 890, 892 (Fed. Cir. 1992).

A.

On appeal, J&E argues that the Court of Federal Claims erred in concluding that it had failed to state a valid claim for a Fifth Amendment taking. The court held that J&E could not proceed with its taking claim because: (1) contractually-based property rights generally do not give rise to taking claims; (2) in the Cherry Point auction, the government was acting in its proprietary capacity rather than in its sovereign capacity; and (3) the purchase contract had not been fully performed and therefore ownership of the transmissions had not vested in J&E. We agree that J&E failed to state a claim for a Fifth Amendment

taking, but we reach that result based upon our conclusion that J&E never acquired a compensable property interest in the helicopter transmissions because the transmissions were never part of the subject matter of the contract.

"[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Therefore, when a plaintiff is unable to assert a set of facts supporting the claim, the motion to dismiss should be granted. *See Chang v. United States*, 859 F.2d 893, 894 (Fed. Cir. 1988). In ruling on a motion to dismiss, the court must "assume all factual allegations to be true and to draw all reasonable inferences in plaintiff's favor." *Henke v. United States*, 60 F.3d 795, 797 (Fed. Cir. 1995).

In order to state a valid claim for a Fifth Amendment taking, J&E must establish a compensable property interest. *See Skip Kirchdorfer, Inc. v. United States*, 6 F.3d 1573, 1580 (Fed. Cir. 1993). Here, J&E claims that it acquired a compensable property interest when title to the transmissions passed to it under the sales contract. We must therefore look to the contract of sale and determine whether J&E acquired any property interest in the transmissions as a result of its contract with DRMO.

Contract interpretation is a question of law which we review *de novo*. *See C. Sanchez & Son, Inc. v. United States*, 6 F.3d 1539, 1544 (Fed. Cir. 1993). Where contract provisions are clear and unambiguous, they must be given their plain and ordinary meaning. *See Alaska Lumber & Pulp Co., Inc. v. Madigan*, 2 F.3d 389, 392 (Fed. Cir. 1993). As noted above, the Invitation for Bids described the items for sale as "Shipping

& Storage Container: 2 EA" The Notice of Award also described the items in the same manner. These descriptions clearly and unambiguously referred only to the containers and not to their contents. There is no indication that either party intended to buy or sell anything other than the containers themselves. We agree with the Court of Federal Claims that "[t]he plain unambiguous meaning of the contract of sale entered into between plaintiffs and the Government grants plaintiffs a right to the shipping and storage containers, nothing more." *J&E IV*, 37 Fed. Cl. at 264.

J&E, however, argues that it acquired title to whatever was physically located in lot numbers 42 through 47. In making that argument, it assigns importance to the fact that DRMO stated in the "GENERAL SALE TERMS AND CONDITIONS" part of the contract, under the heading "CONDITION AND LOCATION OF PROPERTY," that it made "no warranty, express or implied, as to the quantity, kind, character, quality, weight, size, or description of any of the property." We do not believe that the government's warranty disclaimer helps J&E, however. The disclaimer simply precluded the purchaser from alleging a breach of contract if the goods failed to accurately match their description. This provision did not preclude the government from recovering possession of merchandise inadvertently contained within the goods actually sold.

J&E further argues that the container's contents were made part of the contract as a result of the operation of 40 U.S.C. § 484(d) in conjunction with the procedural requirements set forth in the Defense Reutilization and Marketing Manual (the DRMO Manual).[1] Section 484(d) provides that:

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1. The DRMO Manual sets out Department of Defense policies and procedures for the reutilization and marketing of DOD property.

Appendix A

> A deed, bill of sale, lease, or other instrument executed by or on behalf of any executive agency purporting to transfer title or any other interest in surplus property under this subchapter shall be conclusive evidence of compliance with the provisions of this subchapter insofar as concerns title or other interest of any bona fide grantee or transferree for value and without notice of lack of such compliance.

40 U.S.C. § 484(d) (1994). The DRMO Manual requires that all sales solicitations include "an accurate, complete description of the property being offered for sale." J&E therefore reasons that, pursuant to § 484(d), the court must conclusively presume that the government complied with the DRMO Manual by accurately describing the lots as including the helicopter transmissions, regardless of the fact that the government never actually described the lots in such a manner. We disagree.

Section 484(d) prevents the government from challenging the sale of surplus goods based on a claim of lack of authority or mistake. *See United States v. Jones*, 176 F.2d 278, 288 (9th Cir. 1949) (discussing section 25 of the War Surplus Property Act of 1944 (WSPA) which was the predecessor of 40 U.S.C. § 484(d)).[2] In *United States v. Jones*, the government claimed

2. The War Surplus Property Act of 1944 § 25, 50 U.S.C. § 1634 (1946) (repealed 1949) was the predecessor of 40 U.S.C. § 484(d). Section 1634 stated:

> A deed, bill of sale, lease, or other instrument executed by or on behalf of any Government agency purporting to transfer title or any other interest in property under this Act . . . shall be conclusive evidence of compliance with the provisions of this

(Cont'd)

that certain intra-departmental procedures were not properly followed in offering universal gear joints for sale. There was no question that the government had contracted to sell the gear joints, however. The issue was whether the government could rescind the contract for unilateral mistake. The court held that although the facts might be sufficient to justify rescission, section 25 of the WSPA had made the sale immune against attack based on lack of authority or mistake. *See id.* at 288.

Similarly, in *Turney v. United States*, 115 F. Supp. 457 (Ct. Cl. 1953), the government claimed that it lacked authority to dispose of certain radar equipment that had been sold as surplus material. The contract purported to transfer title to all equipment at a military air depot. The Court of Claims held that section 25 of the WSPA precluded the government from challenging the sale of the equipment based on lack of authority. *See id.* at 463.

In *Jones* and *Turney*, the goods clearly were within the scope of the sales contracts involved; the only question was whether the sale could be challenged by the government based on lack of authority or mistake. In this case, the helicopter transmissions were never part of the sales contract and thus § 484(d) is inapplicable. It is clear from the plain language of § 484(d) that the conclusive presumption regarding title only applies to the property which the instrument purports to transfer. Here, the contract documents only purported to transfer an

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(Cont'd)

> Act . . . insofar as title or other interest of any bona fide purchasers for value, or lessees, as the case may be, is concerned.

50 U.S.C. App. § 1634 (1946).

interest in the storage containers. As far as these storage containers are concerned, § 494(d) protects J&E's property interest against government claims of lack of authority or mistake. However, § 484(d) does not create any presumptions regarding title to the transmissions because they were not mentioned either explicitly or implicitly in the contract documents.

Further, government did comply with DRMO Manual requirement that it provide an accurate description of the property being offered for sale. Here, the only items offered for sale were the storage containers and these were accurately described in the contract documents. As discussed above, the helicopter transmissions were never offered for sale.

Finally, in arguing that it acquired title to the helicopter transmissions despite the fact that the contract documents referred only to the storage containers. J&E relies upon the unpublished opinion of the Armed Services Board of Contract Appeals in *Appeal of John T. Gonsalves*, ASBCA No. 31874 (Mar. 10, 1986). In *Gonsalves*, a bidder purchased a number of drums at a surplus auction for $25. Several of the drums were later found to contain infrared missile heads. The bid documents simply described the drums as: "Containers, Shipping: Drums, various sizes." The missile heads which were found in the drums had a fair market value of $1,042.65. The board found that at the time of the auction, Mr. Gonsalves realized that some of the drums contained items inside and bid accordingly. The board also found that the Navy knew that the missile heads were within the drums and concluded that the contract could not be set aside to correct a unilateral mistake. In a one paragraph analysis, the board stated that:

> Doubtless the Navy knew the missile heads and parts were within the drums, whether or not the Navy conveyed this information to the DPDS [Defense Property Disposal Service]. Repeatedly respondent requests that we strictly construe the provisions of their surplus sales contracts. Respondent cannot now ask us to set aside a final sale to correct a mistake it made.

Id. at 2. We do not find this reasoning persuasive. In its brief opinion in *Gonsalves*, the board failed to analyze the fundamental question of whether the missile heads were within the scope of the contract. We therefore decline to adopt the board's reasoning in the case.

For these reasons, we conclude that the helicopter transmissions were not within the scope of the sales contract. Accordingly, J&E never acquired a property interest in the transmissions, and therefore failed in the Court of Federal Claims to state a claim for a Fifth Amendment taking.

B.

J&E next argues that the court erred in holding that it lacked jurisdiction to hear its breach of contract claim. The Court of Federal Claims is a court of limited jurisdiction. *See James M. Ellett Constr. Co., Inc. v. United States*, 93 F.3d 1537, 1541 (Fed. Cir. 1996). The CDA allows the Court of Federal Claims to entertain claims arising out of any express or implied contract for the procurement of property. *See* 41 U.S.C. § 602(a)(1). In order for the court to have jurisdiction under the CDA, a government contractor must present a valid claim to the contracting officer and the contracting officer must issue a final

decision on the claim.[3] *See* 5 U.S.C. § 605(a), (b) (1994); *James M. Ellett*, 93 F.3d at 1541-42. The CDA requires that "[a]ll claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision." 41 U.S.C. § 605(a). However, the CDA does not define what constitutes a claim. In order to determine whether a particular demand constitutes a claim, the court must examine the pertinent Federal Acquisition Regulation (FAR), the language of the contract at issue, and the relevant facts. *See Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1575 (Fed. Cir. 1995). FAR 33.201 defines a claim as "a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract." 48 C.F.R. § 33.201 (1997).

On August 3, 1995, J&E's attorney sent a letter to Assistant United States Attorney G. Norman Acker, III, demanding return of the helicopter transmissions. The trial court concluded that the letter did not constitute a valid claim because it failed to set forth a contractual basis that would entitle J&E to relief, failed to request a final decision, and was not submitted to the contracting officer. We agree with the Court of Federal Claims that J&E's letter did not constitute a valid claim under the CDA.

We have strictly construed the CDA jurisdictional requirements. *See, e.g., Paul E. Lehman, Inc. v. United States*,

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3. If the contracting officer fails to issue a decision within the required period, the claim is deemed denied, and the contractor may then file an appeal with the appropriate board of contract appeals or a suit in the Court of Federal Claims. *See* 41 U.S.C. § 605(c)(5) (1994); *James M. Ellett*, 93 F.3d at 1542 n.3.

673 F.2d 352, 355 (Ct. Cl. 1982) (no jurisdiction to hear a claim that was not certified, even if contracting officer has already fully considered the claim on its merits because the contracting officer had no authority to waive the certification requirement that Congress imposed).[4] Similarly, we must strictly construe the requirement that a CDA claim be submitted to the contracting officer. We have held that a contractor may satisfy this requirement if: (1) the contractor sends a proper claim to its primary contact; (2) the claim contains a request for a final decision of the contracting officer; (3) the contractor has a reasonable expectation that such a request will be honored; and (4) the primary contact in fact timely delivers the claim to the contracting officer. *See Neal & Co., Inc. v. United States*, 945 F.2d 385,388-89 (Fed. Cir. 1991). In this case, J&E's letter simply stated "please treat this letter as a demand for the United States to return the helicopter transmissions which it took from J&E Salvage on September 9, 1994 pursuant to the Order of Judge Howard dated August 18, 1994." The letter was not sent to a contracting officer, and it did not request a final decision from the contracting officer. Nor was there any suggestion in the letter that J&E intended to invoke the CDA disputes process. Furthermore, J&E in fact admits that in sending the letter to Mr. Acker, it had no intent to submit a claim pursuant to the CDA. We therefore conclude that J&E did not submit a valid CDA claim. Nonetheless, J&E argues that it was actually the government that submitted a valid claim when Mr. Acker forwarded the August 3 letter to the DRMO. We disagree.

The Court of Federal Claims concluded that the government had not submitted a claim. The court reasoned that the

4. Pursuant to the Federal Courts Administration Act of 1992, proper certification of a CDA claim is no longer a jurisdictional requirement. *See* 41 U.S.C. § 605(d); *James M. Ellett*, 93 F.3d at 1545.

Department of Justice simply forwarded J&E's letter to the appropriate agency. In addition, the court observed that the government "neither demanded any form of relief nor requested any modification of the contract." *J&E IV*, 37 Fed. Cl. at 262. Further, noting that the FAR requires that a claim be a written demand or assertion, the court stated that there was no suggestion that the government "made any sort of written demand or assertion to the DRMO." *Id.*

J&E argues that we should infer that the government made a claim based on the totality of the circumstances and the fact that the contracting officer issued a final decision. According to J&E, the most logical inference is that either the Department of Justice or DRMO demanded an interpretation of the contract terms so as to give some color of legitimacy to its possession of the transmissions. J&E further argues that we should not read FAR 33.201 so as to place a requirement that claims by the government be in writing, given the fact that 41 U.S.C. § 605 clearly omits such a requirement.

The CDA offers minimal guidance regarding what constitutes a valid government claim, stating simply that "[a]ll claims by the government against a contractor shall be the subject of a decision by the contracting officer." 41 U.S.C. § 605(a). Government claims include those for reimbursement of costs of reprocurement, recovery of excess costs due to defects in performance, recovery of overpayments, recovery of payments made on undelivered goods, setoff against costs later determined to be unallowable, and claims for failure to comply with cost accounting standards. *See* John Cibinic, Jr. & Ralph C. Nash, Jr., *Administration of Government Contracts* 1278 (3d ed. 1995) (collecting cases).

We do not read the FAR as requiring that a government claim be documented in a writing separate from the contracting officer's final decision. Therefore, the lack of a written document demand does not defeat J&E's argument. However, we do not find that the circumstances in this case suggest that the government was asserting a claim. At the time J&E submitted its August 3 letter, the government had possession of the helicopter transmissions under a claim of ownership. There was no reason for the government to submit a claim under these circumstances because it had obtained everything to which it believed it was entitled. The September 13, 1995 letter from Mr. Acker to J&E's counsel states simply that "I referred your August 3, 1995 letter to the counsel for the DRMO for their response." There is no indication in this letter that the government submitted a claim. Rather, the letter suggests that Mr. Acker was simply forwarding J&E's letter to the appropriate government agency. The most logical inference is that the contracting officer rendered a decision based on what he believed to be a valid CDA claim submitted by J&E. In his final decision, the contracting officer stated that he was "issuing the final decision of the sales contracting officer regarding your (J&E's) demand arising under the sales contract." The document also stated that the final decision was "in reference to your August 3, 1995 letter." It therefore seems clear that this letter was written solely in response to J&E's August 3 letter, and not in response to any claim submitted by the government.

It is well established that a contracting officer has no authority to waive a requirement imposed by Congress. *See, e.g., Paul E. Lehman*, 673 F.2d at 356. Therefore, even if the contracting officer rendered what he believed to be a final decision, such a decision would have no legal significance and could not establish jurisdiction in the Court of Federal Claims.

See id.; Skelly & Loy v. United States, 685 F.2d 414, 419 (Ct. Cl. 1982).

For the foregoing reasons, we conclude that J&E's breach of contract claim was properly dismissed for lack of jurisdiction.

Each party shall bear its own costs.

APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF FEDERAL CLAIMS FILED FEBRUARY 11, 1997

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

No. 96-1 C

J & E SALVAGE CO., ET AL.,

v.

THE UNITED STATES

JUDGMENT

Pursuant to the court's opinion, filed February 7, 1997, granting defendant's motion to dismiss.

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that the complaint is dismissed without prejudice for lack of subject matter jurisdiction. No costs.

David A. Lampen
Clerk of Court

By: s/ Amelia C. Simmons

Deputy Clerk

February 11, 1997

NOTE: As to appeal, 60 days from this date, see RCFC 72, re number of copies and listing of *all plaintiffs*. Filing fee is $105.00.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF FEDERAL CLAIMS FILED JULY 18, 1996

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

No. 96-1C
(Filed July 18, 1996)

J & E SALVAGE CO., et al.,

Plaintiffs,

v.

THE UNITED STATES,

Defendant.

Takings; claim for contents of containers bought at government auction.

* * *

ORDER

MILLER, Judge.

This case is before the court on defendant's motion to dismiss for failure to state a claim upon which relief may be granted pursuant to RCFC 12(b)(4). The issue to be decided is whether defendant's refusal to return to plaintiffs certain property placed in containers purchased by plaintiffs constitutes a compensable taking under the just compensation clause of the Fifth Amendment. Argument is deemed unnecessary.

Appendix C

FACTS

The following facts derive from the complaint and are undisputed, unless otherwise noted. On May 19, 1992, at the bequest of the United States Department of Defense, the Defense Reutilization and Marketing Office (the "DRMO") held an auction at Cherry Point, North Carolina, to sell certain surplus materials. John and Teresa Darlington, general partners at J & E Salvage Co. ("plaintiffs"), purchased several "lots" of surplus merchandise at this auction. At the time of the sale, the purchased goods appeared to solely large containers used for shipping and storing helicopter transmissions. Because the containers were bolted shut at the time of the sale, plaintiffs were unable to ascertain what, if anything, was inside the containers.

After plaintiffs paid for the merchandise, government personnel loaded the goods onto plaintiffs' truck for transportation to their company in Onslow County, NC. At some point after returning to their place of business, plaintiffs opened the containers and discovered that four of them held surplus helicopter transmissions valued at $289,660.00 each.

Plaintiffs notified the DRMO of their discovery so as to avoid any accusations of having acquired the transmissions through illegal means. The DRMO responded by informing plaintiffs that the transmissions were still government property and should be returned immediately. Plaintiffs refused to acquiesce. Subsequently, as opposed to utilizing the Contract Disputes Act, 41 U.S.C. §§ 601-613 (1994) (the "CDA"), the DRMO filed suit in the United States District Court for the Eastern District of North Carolina on November 12, 1992, seeking a return of the transmissions.

Appendix C

In their response to the lawsuit, plaintiffs claimed that the CDA governed the matter and thus the federal district court was without subject matter jurisdiciton to hear the case. The district court held that it has requisite jurisdiciton and that the helicopter transmissions were government property and required plaintiffs to relinquish possession of the transmissions. Moreover, the district court declined to dismiss the Government's claim for compensatory and punitive damages. *United States v. J & E Salvage Co.*, No. 92-162-CIV-4-H (E.D.N.C. Aug. 19, 1994) (unpubl.).

Plaintiffs, fearing the district court's contempt power, obeyed the order and turned the transmissions over to the DRMO on September 9, 1994. Furthermore, to avoid the potential financial ruin of an adverse damages award, plaintiffs entered into a pre-appeal stipulation agreement with the DRMO in which they agreed to pay liquidated damages if the appeals court held that plaintiffs had wrongfully converted the helicopter transmissions. In return the DRMO agreed that if judgment were entered for plaintiffs, it would return the transmissions. Plaintiffs subsequently appealed the district court's judgment to the United States Court of Appeals for the Fourth Circuit on November 9, 1994. On June 14, 1995, the Fourth Circuit reversed and remanded with instructions to grant plaintiffs' motion to dismiss for lack of subject matter jurisdiciton. *United States v. J & E Salvage Co.*, 55 F.3d 985 (4th Cir. 1995).

Subsequently, on August 13, 1995, plaintiffs' counsel sent a letter to the United States Attorney for the Eastern District of North Carolina requesting that the DRMO return the helicopter transmissions to plaintiff. In response the DRMO sent plaintiffs a document written by Dan Hurston, who plaintiffs claim was not the cognizant contracting officer, entitled "Finding of Fact and

Final Decision." This document indicated that the DRMO would not return the transmissions to plaintiffs.

On January 2, 1996, plaintiffs filed a complaint in the United States Court of Federal Claims seeking an award of damages in the amount of $1,158,640.00, plus interest and attorneys' fees. In lieu of an answer, defendant moved to dismiss the complaint for failure to state a claim upon which relief may be granted. Defendant asserted that the dispute in this case is not a Fifth Amendment takings claim, but is rather of a contractual nature. Plaintiffs rejoined that full ownership of the transmissions vested after the auction; thus, the DRMO's refusal to return the transmissions constitutes a taking in violation of the Fifth Amendment.[1]

DISCUSSION

"[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Accordingly, if plaintiffs are unable to assert a set of facts supporting the claim, the motion to dismiss should be granted. *Chang v. United States*, 859 F.2d 893, 894 (Fed. Cir. 1988). The severity of such a motion requires that the court "assume all factual allegations to be true and to draw all reasonable inferences in plaintiff's favor." *Henke v. United States*, 60 F.3d 795, 797 (Fed. Cir. 1995). To surmount defendant's motion to dismiss, plaintiffs must allege a set of facts demonstrating a sufficient property interest in the helicopter

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1. Plaintiffs have requested leave to amend their complaint, rather than suffer a dismissal, should the court rule that plaintiffs have failed to state a claim for a taking.

transmissions to render the Government's refusal to return the transmissions a taking in violation of the Fifth Amendment.

Plaintiffs contend that the parties entered into an "as-is" contract for the auction sale of certain surplus goods. Plaintiffs argue that the contract was fully performed upon the completion of the sale and they had obtained title and ownership of the helicopter transmissions. As a consequence plaintiffs assert that the Government's failure to return the transmissions constitutes a taking in violation of the Fifth Amendment. Defendant, however, suggests that plaintiffs' claim should properly be characterized as a breach of contract, not a taking.

To state a valid claim for a taking under the Fifth Amendment's just compensation clause, plaintiffs must establish a compensable property interest. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992) (regulatory taking); *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979) (taking through physical invasion). If a claimant fails to establish a compensable property interest, no further analysis is necessary.

In this case plaintiffs allege a compensable property interest that is derived through their sales contract with the DRMO. Plaintiffs' reliance on an alleged contractually-based property right poses a significant hurdle that must be overcome. "[T]he concept of taking as a compensable claim theory has limited application to the relative rights of party litigants when those rights have been voluntarily created by contract. In such instances, interference with such contractual rights generally gives rise to a breach claim not a taking claim." *Baggett Transp. Co. v. United States*, 969 F.2d 1028, 1034 (Fed. Cir. 1992) (quoting *Sun Oil Co. v. United States*, 215 Ct. Cl. 716, 770, 572 F.2d 786, 818 (1978) (citation omitted)); *see also J.J. Henry Co. v. United States*

188 Ct. Cl. 39, 46, 411 F.2d 1246, 1249 (1969) ("The amendment has limited application to the relative rights in property of parties litigant which have been voluntarily created by contract.")

Not every deprivation of use or control constitutes a taking. *Sun Oil Co.*, 215 Ct. Cl. at 769, 572 F.2d at 818. Furthermore, "[w]hen the government 'takes' property, it exercises its rights as sovereign to acquire property from the rightful owner for the public good." *DSI Corp. v. United States*, 228 Ct. Cl. 299, 302, 655 F.2d 1072, 1074 (1981). In the case at bar, plaintiffs do not allege or argue that the Government intended to take the transmissions for the public good. *See J.J. Henry Co.*, 188 Ct. Cl. at 46, 411 F.2d at 1249. Rather, nothing in the complaint, or that reasonably could be inferred from it, indicates that the Government was acting other than in its proprietary capacity to dispose of certain surplus materials among which were the helicopter transmissions in question.[2] When the Government "comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same laws that govern individuals there." *Sun Oil Co.*, 215 Ct. Cl. at 770, 572 F.2d at 818, (quoting *Cooke v. United States*), 91 U.S. 389, 398 (1875)).

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2. Plaintiffs have suggested that the auction to dispose of the surplus property was a special situation wherein the Government acted in its sovereign capacity to simply dispose of large amounts of unneeded property as promptly as possible. In such situations, plaintiffs contend, each participant assumes a certain amount of risk with regard to the transaction. In support of this argument, plaintiffs rely on *Appeal of John T. Gonsalves*, ASBCA No. 31874 (1986), an unpublished decision wherein the Armed Services Board of Contract Appeals refused to require a bidder to return 43 seeker heads for sidewinder missiles that the Navy had inadvertently left in containers purchased at a surplus sale. While *Gonsalves* may be persuasive with respect to the scope of the sales contract, that the ASBCA entertained the case certainly militates against plaintiffs' argument that the action is a taking.

As a consequence, a takings claim cannot be based on the Government's acting in its proprietary capacity. *Alaska Airlines, Inc. v. Johnson*, 8 F.3d 791, 798 (Fed. Cir. 1993).

Moreover, the parties in this case dispute the terms of the contract of sale. The Government clearly did not utilize its position as sovereign to appropriate private property from its rightful owner. Instead, each party is asserting a claim of right to the helicopter transmissions in question, so that neither party has clear title to the property. The dispute devolves to whether the Government breached the terms of its contract of sale with plaintiffs by failing to provide plaintiffs with all of the property to which plaintiffs believe they are entitled. In a similar situation, the United States Court of Claims noted that: "In essence, th[e] . . . case involved a contest between two parties over conflicting claims of ownership. On such facts, it is axiomatic that there is not taking where, pursuant to a court order, the government is in possession of property to which it asserts a claim of rightful ownership." *DSI Corp.*, 228 Ct. Cl. at 303, 655 F.2d at 1074.

Plaintiffs also assert that upon paying for the surplus goods, the contract was fully performed and that they had acquired clear title to the helicopter transmissions. Therefore, according to plaintiffs, this action cannot be of a contractual nature and, in fact, properly is characterized as a taking. However, the Government's alleged failure to provide plaintiffs with all of the property to which plaintiffs believe they are entitled indicates that the contract cannot have been fully performed. Because the contract has not been fully performed, ownership has not vested with plaintiffs. Plaintiffs therefore have failed to allege a set of facts supporting a takings claim under the Fifth Amendment.

Appendix C

In evaluating plaintiffs' request to amend their complaint, the court must consider "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of amendment. . . ." *Forman v. Davis*, 371 U.S. 178, 182 (1962). No factors are present that would suggest that the court should not grant plaintiffs' request for leave to amend. *Cf. Mitsui Foods, Inc. v. United States*, 867 F.2d 1401, 1404 (Fed. Cir. 1989) (denying plaintiff leave to amend on ground of futility). Rather than dismissing plaintiffs' claim pursuant to RCFC 12(b)(4), the court grants plaintiffs leave to amend their complaint to allege a breach of contract claim.[3]

CONCLUSION

Accordingly, based on the foregoing,

IT IS ORDERED, as follows:

1. Defendant's motion to dismiss is denied.

2. By August 1, 1996, plaintiffs may amend their complaint to allege a breach of contract claim, with service by overnight express mail.

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3. In its reply defendant noted that it opposes plaintiffs' request to amend their complaint and that, if such leave is granted, defendant likely would file a motion pursuant RCFC 12(b)(1) to dismiss for lack of subject matter jurisdiction. In support of its motion to dismiss, defendant included several documents as an appendix to its reply brief. These documents would controvert plaintiffs' version of the terms of sale and be appropriate for consideration on a motion for summary judgment. The court, however, cannot consider material beyond the pleadings when evaluating a motion to dismiss under RCFC 12(b)(4).

Appendix C

3. Defendant shall respond to plaintiffs' amended complaint by August 11, 1996, with service by overnight express mail.

s/ Christine O.C. Miller
Christine Odell Cook Miller
Judge

APPENDIX D — ORDER OF THE UNITED STATES COURT OF FEDERAL CLAIMS FILED SEPTEMBER 20, 1996

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

No. 96-1C

(Filed Sept. 20, 1996)

J & E SALVAGE CO., *et al.*,

Plaintiffs,

v.

THE UNITED STATES,

Defendant.

ORDER

This case is before the court on plaintiffs' motion for reconsideration of an order entered on July 18, 1996, denying defendant's motion to dismiss. Plaintiffs ask the court 1) to reconsider the finding that plaintiffs had failed to state a claim in support of a taking under the just compensation clause of the Fifth Amendment, and 2) to allow plaintiffs to amend their complaint to allege a breach of contract claim.

A motion for reconsideration is addressed to the court's discretion. *Yuba Natural Resources, Inc. v. United States*, 904 F.2d 1577, 1583 (Fed. Cir. 1990). This showing, under RCFC 59, "must be based upon manifest error of law, or mistake of act, and is not intended to give an unhappy litigant an additional

chance to sway the court." *Circle K Corp. v. United States,* 23 Cl. Ct. 659, 664-65 (1991) (citation omitted); *see Cohen v. Austin,* 869 F. Supp. 320, 321, (E.D. Pa. 1994) (discussing errors in law and fact). To gain relief plaintiffs must demonstrate: 1) that there has been an intervening change in the controlling law; 2) that evidence previously unavailable has become available; or 3) that the motion is necessary to prevent manifest injustice. *Bishop v. United States,* 26 Cl. Ct. 281, 286 (1992); *Aerolease Long Beach v. United States,* 31 Fed. Cl. 342, 376 (quoting *Bishop,* 26 Cl. Ct. at 286) *aff'd,* 39 F.3d 1198 (Fed. Cir. 1994) (Table).

Plaintiffs first contend that, in an action involving surplus sales, the Government is acting in its sovereign, as opposed to its proprietary, capacity. In support of this contention, plaintiffs rely on *United States v. Jones*, 176 F.2d 278 (9th Cir. 1949). In making a choice of law determination, *Jones* states: "This is a case in which the Government, in its sovereign capacity, deals with property which it owns." *Id.* at 281. The meaning of the term "sovereign capacity" only becomes clear if one considers the quotation on which the *Jones* court relied:

> Every acquisition, holding, or disposition of property by the Federal Government depends upon proper exercise of a constitutional grant of power. . . .
>
> . . .The validity and construction of contracts through which the United States is exercising constitutional functions, their consequences on the rights and obligation of the parties, the titles or liens which the create or permit, all present questions of federal law. . . .

United States v. County of Allegheny, 322 U.S. 174, 182, 183 (1944) (quoted in *Jones*, 176 F.2d at 281). The Ninth Circuit in *Jones* sought to illustrate the fundamental point that, in order for the Government to act, a grant of power from the Constitution to the sovereign must be present. *Allegheny*, 322 U.S. at 182. This does not mean that every act by the Government is a sovereign act.

As plaintiffs note, the Government's power to contract is a characteristic of its sovereignty. *See United states v. Hodson*, 77 U.S. 395, 407 (1870); *United States v. Tingey*, 30 U.S. 115, 128 (1831). However, not every contract that the Government enters into is one that involves a use of sovereign authority. To determine if the Government has acted in a sovereign or proprietary capacity, one must examine "the nature of the government's action and the relationship of the parties involved." *Juda v. United States*, 6 Cl. Ct. 441, 454 (1984). In this case the Government has "come[] down from its position of sovereignty, and enter[ed] the domain of commerce. . . ." *Cooke v. United States*, 91 U.S. 389, 398 (1875).

To buttress their takings claims, plaintiffs rely primarily on *Turney v. United States*, 126 Ct. Cl. 202, 115 F. Supp. 457 (1953), although plaintiffs previously had not brought this case to the court's attention. In *Turney* the Government inadvertently included certain military radars in a sale of surplus equipment held in the Philippines. Upon realization of the mistake, the Government exerted direct and significant influence on the Philippine government to place an embargo on the surplus material purchased by plaintiff that would permit the United States to repossess the radars. The United States Court of Claims held that such behavior constituted a taking. *Id.* at 214, 115 F. Supp. at 463.

Appendix D

Turney is clearly distinguishable from the instant case. The Federal Circuit has noted that the *Turney* rationale for finding a taking was that the Government had exerted "substantial, direct involvement in view of then-pervasive United States military and economic presence." *Erosion Victims of Lake Superior Regulation v. United States*, 833 F.2d 297, 300 (Fed. Cir. 1987). Such influence is not present in the case at bar. The Government did not exert its sovereign power to repossess the helicopter transmissions at issue. Rather, the Government was operating under a claim of right provided by what at that point was a valid court order. That the issuing court was later found to lack subject matter jurisdiction does not alter the fact that when the Government took possession of the transmissions, it did so under a claim of right. As the United States Court of Claims has previously noted: "[I]t is axiomatic that there is no taking where, pursuant to a court order, the government is in possession of property to which it asserts a claim of rightful ownership." *DSI Corp. v. United States*, 228 Ct. Cl. 299, 303, 655 F.2d 1072, 1074 (1981). Accordingly, based on the foregoing,

IT IS ORDERED, as follows:

Plaintiffs' motion for reconsideration of the order entered on July 18, 1996, is denied. *See* Order entered on August 9, 1996.

s/ Christine O.C. Miller
Christine Odell Cook Miller
Judge

APPENDIX E — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DECIDED JUNE 14, 1995

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

J & E SALVAGE COMPANY; JOHN DARLINGTON; TERESA N. DARLINGTON, Executrix of the Estate of Edward Darlington,

Defendants-Appellants.

Appeal from the United States District Court
for the Eastern District of North Carolina, at New Bern.
Malcolm J. Howard, District Judge.
(CA-92-162)

Argued: May 1, 1995

Decided: June 14, 1995

Before HALL, WILKINSON, and HAMILTON, Circuit Judges.

* * *

Appendix E

OPINION

WILKINSON, Circuit Judge:

The issue in this appeal is whether the district court had subject matter jurisdiction over claims brought by the United States against a government contractor regarding the ownership of property purchased at a military surplus auction. Relying on the Contract Disputes Act ("CDA"), 41 U.S.C. § 601 et seq., the district court determined that it lacked jurisdiction over the government's contract claims, yet it allowed additional claims styled as tort actions for "conversion" and "replevin" to proceed. We believe that this entire matter was essentially a contract dispute within the ambit of the Contract Disputes Act, and that the district court lacked jurisdiction to decide it.

I.

On May 19, 1992, appellant J&E Salvage Co. ("J&E") purchased seven lots of shipping and storage containers at Defense Reutilization and Marketing Officer ("DRMO") surplus auction in Cherry Point, North Carolina. J&E generally bought such containers at government auctions for the purpose of converting them into vats of selling them as scrap metal. This sale was conducted under the terms and conditions of a DRMO "Sale by Reference" pamphlet issued to all potential buyers at the surplus auction. A bill of sale, titled as a "Notice of Award," was also issued by the DRMO to J&E at the time of purchase.

Unbeknownst to either J&E or the DRMO, the storage bins purchased at the auction contained four CH-46 helicopter transmissions. J&E discovered the transmissions roughly two or three weeks after the sale. John Darlington, one of the partners in

J&E, contacted Alice Martin, the DRMO sales contracting officer, and notified her about the transmissions. Martin and several other DRMO officials asked Darlington to return the transmissions, but he refused, arguing that J&E had lawfully purchased them at the Cherry Point auction.

The United States then brought this action in federal district court in the Eastern District of North Carolina to recover the transmissions. The government alleged several causes of action including rescission of the contract because of mutual mistake of fact, conversion, and replevin. In reply, J&E argued that the district court lacked subject matter jurisdiction over the government's case because the matter belonged within the exclusive province of the administrative scheme established by the Contract Disputes Act. Acting upon the recommendations of a magistrate judge, the district court concluded that it had jurisdiction over the government's "tort" claims of conversion and replevin, but not over the contract claim for mutual mistake of fact. The court then proceeded to reach the merits of the case, finding that the United States was the true owner of the transmissions, and granted summary judgment in favor of the government. J&E now appeals.

II.

A.

Federal jurisdiction over civil actions initiated by the United States government is provided by 28 U.S.C. § 1345, which states:

> Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by

> the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.

28 U.S.C. § 1345 (1993). Thus, federal courts have jurisdiction over any case brought by the United States as a plaintiff unless Congress has "otherwise provided" for jurisdiction elsewhere.

One area in which Congress has so "otherwise provided" is the Contract Disputes Act, 41 U.S.C. § 601 et seq. (1988). The Contract Disputes Act is a comprehensive statutory scheme for resolving contractual conflicts between the United States and government contractors. It applies, *inter alia*, to actions involving "any express or implied contract . . . entered into by an executive agency for . . . the disposal of personal property." 41 U.S.C. § 602. Under the CDA, government claims against a contractor must first be the subject of a decision by the contracting officer, defined as "any person who . . . has the authority to enter into and administer contracts and make determinations and findings with respect thereto." 41 U.S.C. §§ 601(3), 605(a). The decision by the contracting officer may be appealed to an agency board of contract appeals or to the United States Court of Federal Claims. 41 U.S.C. §§ 607(d), 609(c). Further appeals from these bodies must be filed with the United States Court of Appeals for the Federal Circuit. 41 U.S.C. § 607(g)(1); *see United States v. Rockwell International Corp.*, 795 F. Supp. 1131, 1134 (N.D. Ga. 1992).

The review procedures under the CDA are exclusive of jurisdiction in any other forum. 41 U.S.C. § 605(b); *see also Management Science America, Inc. v. Pierce*, 598 F. Supp. 223, 225 (N.D. Ga. 1984), *aff'd*, 778 F.2d 792 (11th Cir. 1985). Thus, federal district courts lack jurisdiction over government claims against contractors which are subject to the CDA. *See* S. Rep.

No. 1118, 95th Cong., 2d Sess. 10, *reprinted* in 978 U.S.C.C.A.N. 5235, 5244 (noting that "U.S. district court jurisdiction is eliminated from Government contract claims").

In order to determine whether the CDA applies, federal courts generally look to whether the dispute at issue is one of contract. *See Ingersoll-Rand Co. v. United States*, 780 F.2d 74, 76 (D.C. Cir. 1985). The court in *Megapulse, Inc. v. Lewis*, 672 F.2d 959 (D.C. Cir. 1982), stated that courts should attempt "to make rational distinctions between actions sounding genuinely in contract and those based on truly independent legal grounds." 672 F.2d at 969-70. The *Megapulse* court further noted that when examining "competing" jurisdictional bases, the issue is "to determine if the claim so clearly presents a disguised contract action that jurisdiction over the matter is properly limited to the Court of Claims."[1] *Id.* at 968.

It is well-established therefore that disguised contract actions may not escape the CDA. *See, e.g., Ingersoll-Rand*, 780 F.2d at 77; *American Science & Engineering, Inc. v. Califano*, 571 F.2d 58, 61 (1st Cir. 1978). Neither contractors nor the government may bring a contract action in federal district court simply by recasting claims in tort language or as some statutory or regulatory violation. *See Sealtite Corp. v. General Services Admin.*, 614 F. Supp. 352, 254 (D. Colo. 1985) (rejecting attempt to "circumvent the [CDA] by characterizing dispute as an action in replevin").

1. This mode of analysis was developed in the parallel context of contractor claims against the government through 28 U.S.C. § 1346, as opposed to the § 1345 action in this case. Both situations, however, deal with the identical question of the applicability of the CDA. Thus, we find that the *Megapulse* analysis is equally pertinent in the setting of government claims against conractors. *See* S. Rep. No. 1118, *reprinted in* U.S.C.C.A.N. at 5260 (noting intent of Congress is to provide "equal rights" under the CDA to both the government and contractors).

Appendix E

Effective enforcement of the jurisdictional limits of the CDA mandates that courts recognize contract actions that are dressed in tort clothing.

B.

This action by the United States is essentially one of contract, despite the government's efforts to present it as a tort case. The crux of the case rests on a specific contract — the bill of sale between J&E and the DRMO. The merits question presented is one of contract interpretation, *i.e.*, did the bill of sale and the accompanying DRMO sales pamphlet allow a transfer of ownership of the hidden transmissions along with the containers purchased at the auction. This is a classic "scope of the contract" issue. *See International Engineering Co. v. Richardson*, 512 F.2d 573, 578 (D.C. Cir. 1975), *cert. denied*, 423 U.S. 1048 (1976); *see also* John Calamari & Joseph M. Perillo, Contracts § 3-10 (3d ed. 1987). In order to decide this question, it is impossible to ignore the terms of the contract documents surrounding the sale. For example, the DRMO sales pamphlet specifically states that all property sold at auction is "as is." On the other hand, the bill of sale lists the items sold as "containers" and makes no reference to transmissions. The meaning of these provisions controls the outcome of this case. Hence, "it is possible to conceive of this dispute as entirely contained within the terms of contract." *Ingersoll-Rand* 780 F.2d at 78.

Alternatively, the question could be phrased as whether the sale was void for unilateral or mutual mistake of fact. Again, however, the source of the rights the government seeks to vindicate are rooted firmly in contract. *See Megapulse*, 672 F.2d at 968. Mistake of fact, the government concedes, is unquestionably a contract doctrine. *See* Calamari, Contracts § 9-26.

Every aspect of this case relates to these contract questions. All the evidence gathered during the discovery process deal with the documents generated during the sale, the conduct of the auction, and the authority of the DRMO to enter into sales contracts. Furthermore, the dispute involves issues of custom and practice in government auctions. J&E contends, for example, that it is commonly understood that auction purchases of "container" include whatever may happen to be in the containers. This matter therefore calls for background in the field of government contracting — a subject within the unique expertise of the Court of Claims. *Ingersoll-Rand*, 780 F.2d at 78.

Perhaps most telling of all, the briefs of the parties allude over and over to the contractual issues that govern this dispute. In addition to arguing at length that either a unilateral or mutual mistake of fact prevented the formation of a contract, the government refers repeatedly to questions about party "intent," "meaning of minds," the "binding force of the contract," and the "terms of the sale," and relies heavily on contract cases. Likewise, the government argues extensively about why these rules of contract law should apply to government contracts generally and this case in particular, apparently blind to the contradiction between its position on the merits and its jurisdictional contention that this is not a contract case. *See Manshul Construction Co. v. United States*, 687 F. Supp. 60, 62 (E.D.N.Y. 1988) ("[P]etitioner, despite strenuous efforts to avoid doing so, occasionally lapses into language that reveals the fundamentally contractual origins of the [case]").

The district court also acknowledged that this is at heart a contract case when it noted that the "only real dispute is whether the United States is the true owner of the transmissions," and then proceeded to answer that question by looking to contract

law. The court's opinion granting summary judgment, like the government's brief, is replete with references to contract issues and the contractual documents at the center of this controversy. In particular, the district court relied on theories of "void versus voidable" contracts, mistake of fact, and the doctrine of "unknown contents," and ultimately held that "no valid contract was formed to sell the transmissions."

The district court also rejected the government's claim for punitive damages, which is another factor suggesting that the case was more an action in contract than in tort. Moreover, the principal remedy sought by the government and granted by the district court was rescission of the sale and the return of the transmissions. This was, of course, a contract remedy. *See Ingersoll-Rand*, 780 F.2d at 79-80 (CDA controls when party is seeking contract remedy).

The government's claims of "conversion" and "replevin" are merely transparent reformulations of the contract dispute. A tort claim of conversion requires showing some unauthorized act of control over property belonging to another. *See United States v. Stockton*, 788 F.2d 210, 216 (4th Cir.), *cert. denied*, 479 U.S. 840 (1986). In this case, arguing that J&E "converted" the transmissions is the same thing as saying that the transmissions were not covered by the bill of sale. Of course, the mere fact that a court has to decide some contract issues in the course of resolving a tort action does not automatically convert the claim into one sounding in contract if there is some independent basis for the tort clam. *Megapulse*, 673 F.2d at 969. *See also Restatement (Second) of Contracts* § 355 (1981). Here, however, there is not independent basis for a tort. The contract between the parties is the alpha and omega of this dispute. Because the government's allegations are no more than cloaked contract

claims, they belong in the Court of Claims under the CDA, and the district court lacked jurisdiction over them.[2]

C.

Finally, several important considerations counsel against overly narrow definitions of what qualifies as a "contract action" for purposes of the CDA. First, allowing the government to attack contracts of sale with private parties by manufacturing tort claims undermines the express intent of Congress to reduce and simplify disputes over the sale of surplus government property. *See* 40 U.S.C. § 484. The statutory provisions for governing the disposal of government property indicate, for instance, that bills of sale are to be conclusive evidence of title, thereby providing some measure of certainty to private purchases of government material. 40 U.S.C. § 484 (d). Converting claims into tort actions sidesteps these rules, and thus must be discouraged.

Second, respect for the jurisdictional route set forth in the CDA avoids the inefficiencies involved in splitting an action between two different forums. As the district court acknowledged, the core contract question belongs in the Court of Federal Claims. Taking up the same claim in federal district court merely because an artful pleader is able to term it a tort significantly increases the costs of litigation for the government, the private contractor, and the judicial system. Circumvention of the CDA's jurisdictional mandate scatters government contract claims across the judicial

2. The district court relied heavily on *Megapulse*, which found the action therein was not a disguised contract claim. We think that the *Megapulse* analysis supports the result reached here. The facts of *Megapulse*, however, are different from the instant case. There, the dispute arose *prior* to the contract, no contract remedy was sought, and several independent statutory issues were presented. That case was more than simply a tort reformulation of a contract dispute.

landscape. If the case can be resolved on a contract basis in the Claims Court, the most efficient procedure is to dismiss any phantom "tort" allegations tacked on to the contract claim.

Third, by calling contract actions what they truly are and enforcing the jurisdictional limits of the CDA, we effectuate Congress' intent to employ the expertise of the Court of Claims in these matters. For example, in addition to questions about auction customs, this case raises issues about the meaning of "surplus property" under 40 U.S.C. §§ 472(g) and 484(d), DRMO property disposal procedures, the extent of DRMO authority, and the proper interpretation of DRMO sales pamphlet terms. As noted above, the Court of Claims has specialized experience regarding the intricate world of government contracting. Congress believed that issues like the ones presented here will be most accurately and consistently resolved by a tribunal dedicated to this particular subject. This case provides a good example of the kind of government contract action that belongs within the specialized scheme provided by the CDA.

III.

For the foregoing reasons, the judgment of the district court is reversed and remanded with instructions to grant defendant's motion to dismiss the action for want of subject matter jurisdiction. Nothing herein shall prevent a transfer of this action to a proper forum under the provisions of 28 U.S.C. § 1631, if the district court finds such transfer appropriate.

REVERSED AND REMANDED

Appendix E

HALL, Circuit Judge, dissenting:

As the majority readily acknowledges, *ante* at 7, an unauthorized act of control over property belonging to another constitutes the tort of conversion. When John Darlington telephoned Alice Martin, the sales contracting officer at DRMO, to tell her that he had discovered the transmissions, Martin told Darlington that J&E should give them back. Within a few days, another DRMO representative called Darlington to repeat Martin's request. These conversations were followed by a written demand for the transmissions' return.

If the transmissions belonged to DRMO, then J&E's failure to return them was a conversion — and thus a tort. Although settling the issue of ownership in this case would necessarily involve examining the contract between J&E and DRMO, such an examination does not transmogrify a tort claim into a contract claim. J&E has now returned the transmissions; the only substantial issues that remain are whether the government owned them, and, if so, the damages to which it is entitled as a result of J&E's tortious conduct.

The Court of Claims, though proficient in settling contract disputes, is powerless to decide tort cases. *See, e.g., Transcountry Packing Co. v. United States*, 568 F.2d 1333, 1336 (Ct. Cl. 1978) ("This court . . . does not have jurisdiction over tort claims.") (citation omitted). Today, the majority remarkably announces that such cases are likewise outside the reach of the district court. Although Lewis Carroll might have fancied such a result, I do not.

I respectfully dissent.

APPENDIX F — APPEAL OF JOHN T. GONSALVES

ARMED SERVICES BOARD OF CONTRACT APPEALS

ASBCA No. 31874

Appeal of —

John T. Gonsalves

Under contract No. 41-4355-326

APPEARANCES FOR THE APPELLANT:

John T. Gonsalves, President

APPEARANCES FOR THE GOVERNMENT:

Roberta T. Eaton, Esq.
Trial Attorney,
Defense Reutilization and Marketing Service
Federal Center (DLA)
Battle Creek, Michigan

OPINION BY ADMINISTRATIVE JUDGE SCHEPERS
PURSUANT TO RULE 12.2

At a Defense Property Disposal sale appellant purchased drums which were found to contain infrared receivers/seeker heads. The parties dispute whether the Government may demand return of these items.

SUMMARY FINDINGS AND CONCLUSIONS

At auction appellant purchased item 128 for $25.00 which was described as follows:

Appendix F

128. CONTAINER, SHIPPING; Drums, various sizes. Est. 400 ea.

1 LOT

The Instructions, Terms & conditions applicable to the sale contain the General Provisions which include: paragraph 2, Condition and Location of Property; paragraph 30, Guaranteed Descriptions; and paragraphs D and C, Award of Contract.

Some of the drums had labels which read "Seeker Head". "Receiver Infrared" and "[R Det. Hed." The labels were green in color with "NON-RF[" and "Special Handling", also printed on them.

Appellant realized by inspection that some of the drums contained items inside and "bid accordingly."

Appellant removed the drums in increments, completing the removal by 2 July 1984.

Each drum with items inside weighed approximately 40 pounds more than empty drum.

When he opened the drums and saw the items, appellant assumed he had obsolete surplus electronic junk.

At the suggestion of a surplus dealer friend, appellant contacted a former Navy sales official who referred appellant to the Aviation Supply Office. Appellant thought he was contacting surplus dealers, but later found it was the Department of the Navy. This contact was on 26 June 1984.

Appendix F

Respondent's investigation revealed that the infrared receivers/seeker heads has been declassified by the Navy and that appellant had approximately 43 of the seeker heads.

Respondent states the fair market value of the sidewinder missile heads is $33.63 each for the 19 complete units and $16.82 each for the 24 incomplete units for a total of $1,042.65.

Appellant states that had respondent approached him in a business like manner, acknowledging that appellant is the owner of the seeker heads, the parties could have reached an amicable solution that would only entail appellant's costs for transporting the containers to appellant's shop.

Respondent contends that it is entitled to either pick up the missile heads or to demand an amount of $1,042.65 from appellant.

Doubtless the Navy knew the missile heads and parts were within the drums, whether or not the Navy conveyed this information to the DPDS. Repeatedly respondent requests that we strictly construe the provisions of their surplus sales contracts. Respondent cannot now ask us to set aside a final sale to correct a mistake it made.

Accordingly, the appeal is sustained.

Dated 10 March 1986.

s/ Jean Schepers
JEAN SCHEPERS
Administrative Judge
Member of the Armed Services
Board of Contract Appeals

APPENDIX G — SALE OF GOVERNMENT PROPERTY, GENERAL SALE TERMS AND CONDITIONS

PART 2

DO NOT RETURN WITH BID

SALE OF GOVERNMENT PROPERTY GENERAL SALE TERMS AND CONDITIONS

1. INSPECTION.

The Bidder is invited, urged, and cautioned to inspect the property prior to submitting a bid. Property will be available for inspection at the places and times specified in the Invitation.

2. CONDITION AND LOCATION OF PROPERTY.

Unless otherwise provided in the Invitation, all property listed therein is offered for sale "as is" and "where is." Unless otherwise provided in the Invitation, the Government makes no warranty, express or implied, as to quantity, kind, character, quality, weight, size, or description of any of the property, or its fitness for any use or purpose. Except as provided in Conditions No. 12 and 14 or other special conditions of the Invitation, no request for adjustment in price or for rescission of the sale will be considered. *This is not a sale by sample.*

3. CONSIDERATION OF BIDS.

(a) Unless otherwise provided in the Invitation, telegraphic or telephonic bids will not be considered.

(b) The Bidder agrees that his bid will not be withdrawn within the period of time specified for the acceptance thereof

following the opening of bids (60 calendar days if no period is specified by the Government or by the Bidder, but not less than 10 calendar days in any case) and that during such period his bid will remain firm and irrevocable. The Government reserves the right to reject any or all bids, including bids under which a Bidder would take unfair advantage of the Government or other Bidders, to waive any technical defects in bids, and unless otherwise specified by the Government or by the Bidder, to accept any one item or group of items in the bid as may be in the best interest of the Government. Unless the Invitation otherwise provides, a bid covering any listed item must be submitted on the basis of the unit specified for that item and must cover the total number of units designated for that item.

4. FORMS OF BID DEPOSITS AND PAYMENTS.

Unless otherwise provided in the Invitation, bid deposits (when required by the Invitation) and payments shall be in U.S. currency or any form of credit instruments other than promissory notes, made payable on demand in U.S. currency: *Provided*, That uncertified personal or business checks must be first party instruments: *Provided further*, That if in connection with any prior sale, the Bidder or Purchaser tendered an uncertified personal or business check which was not paid by the drawee for any reason and the Bidder, Purchaser, and the Drawer of the check were so notified in writing by the selling agency, uncertified personal or business checks will not be an acceptable form of bid deposit or payment. Bids submitted after the effective date specified in the written notification referred to which are not accompanied by the proper bid deposit will be summarily rejected.

Appendix G

5. BID PRICE DETERMINATION.

When bids are solicited on a unit price basis. Bidders will insert their unit prices and total prices in the space provided for each item.

(a) In the event the Bidder inserts a total price on the item but fails to insert a unit price, the Government will determine the unit price by dividing the total price by the quantity of the item set out in the Invitation. The unit price so determined shall be used for the purpose of bid evaluation, award, and all phases of contract administration.

(b) When bids are solicited on a "lot" basis, Bidders should submit a single total price in the Total Price Bid column of the bid sheet. Bidders should not make any entry in the Unit Price Bid column. In the event a Bidder submits a total bid price and also a unit bid price which are not identical, the unit bid price will not be considered.

6. PAYMENT.

The Purchaser agrees to pay for property awarded to him in accordance with the prices quoted in his bid. Subject to any adjustment made pursuant to other provisions of this contract, payment of the full purchase price, after applying the total bid deposit, if any, must be made within the time specified in the Invitation and prior to delivery of any of the property. If an adjustment is made requiring additional payment, such payment must be made immediately upon notice of such adjustment. In the absence of any debts owed to the selling agency, where the total sum becoming due to the Government from the Purchaser on a contract awarded to him under the Invitation is less than the

total amount deposited with his bid, the difference will be promptly refunded and also, deposits accompanying bids which are not accepted will be promptly refunded to the Bidder. No refund or demands will be made for any amount less than one dollar ($1).

7. TITLE.

Unless otherwise provided in the Invitation, title to the property sold hereunder shall vest in the Purchaser as and when removal is effected. On all motor vehicles and motor-propelled or motor-drawn equipment requiring licensing by a State motor vehicle regulatory agency, a certificate of release, Standard Form 97, will be furnished for each vehicle and piece of equipment unless otherwise provided in the Invitation.

8. DELIVERY, LOADING, AND REMOVAL OF PROPERTY.

(a) Unless otherwise provided in the Invitation, the Purchaser shall be entitled to obtain the property upon full payment therefor with delivery being made only from the exact place where the property is located within the installation. The Purchaser must make all arrangements necessary for packing, removal, and transportation of property. The Government will not act is liaison in any fashion between the Purchaser and carrier, nor will the Government recommend a specific common carrier. Loading will only be performed as set forth in the Invitation, and unless otherwise provided in the Invitation, loading will not be performed on Saturdays, Sundays, Federal holidays, or any day that the installation where the property is located is closed. Where it is provided that the Government will load, the Government will make the initial placement of the property on conveyance(s) furnished by the Purchaser and the initial placement on the Purchaser's

conveyance shall be as determined by the Government. Unless otherwise provided in the Invitation, the Government will not block, chock, brace, lash, band, or in any other manner secure the cargo on such conveyance(s) furnished by the Purchaser.

(b) Where it is provided in the Invitation that the Government will not load or that the Purchaser will load, the Purchaser will make all arrangements and perform all work necessary to effect removal of the property. The Purchaser shall remove the property at his expense within the period of time allowed in the Invitation. If the Contracting Officer determines that the failure to remove the property within the period of time originally allowed arose out of causes beyond the control and without the fault or negligence of the Purchaser, such determination shall be reduced to writing, and a reasonable extension of time for removal shall be allowed. Such causes may include, but are not restricted to, acts of God or of the public enemy, acts of the Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and severe weather. If the Purchaser is permitted to remove the property after the expiration of the time originally allowed for removal or any additional time allowed by the Contracting Officer pursuant to this clause, the Government, without limiting any other rights which it may have, may require the Purchaser to pay a reasonable storage charge. The Purchaser shall reimburse the Government for any damage to Government property caused during the removal operations by the Purchaser or his authorized representative.

(c) Items purchased under the Invitation will be released only to the Purchaser or his authorized representative. The authorized representative must furnish authorization from the Purchaser to the Custodian of the property location before any delivery or

release will be made. When property is described as being boxed, packed, crated, skidded, or in containers, the Government does not warrant that the property, as packaged, is suitable for shipment.

(d) Segregation, culling, or selection of property for the purpose of effecting partial or increment removals will not be permitted except as specifically authorized and prescribed by the Government.

9. DEFAULT.

If, after the award, the Purchaser breaches the contract by failure to make payment within the time allowed by the contract as required by Condition No. 6, or by failure to remove the property as required by Condition No. 8, then the Government may send the Purchaser a 15-day written notice of default (calculated from date of mailing), and upon Purchaser's failure to cure such default within that period (or such further period as the Contracting Officer may allow) the Purchaser shall lose all right, title, and interest which he might otherwise have acquired in and to such property as to which a default has occurred. The Purchaser agrees that in the event he fails to pay for the property or remove the same within the prescribed period(s) of time, the Government shall be entitled to retain (or collect) as liquidated damages a sum equal to the *greater* of (a) 20 percent of the purchase price of the item(s) as to which the default his occurred, or (b) $25, or the purchase price of such item(s) if the

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APPENDIX H — DEFENSE REUTILIZATION AND MARKETING MANUAL

DoD 4160.21-M
MARCH 1990

DEPARTMENT OF DEFENSE
UNITED STATES OF AMERICA

DEFENSE

REUTILIZATION AND MARKETING

MANUAL

DEPARTMENT OF DEFENSE

OFFICE OF THE ASSISTANT
SECRETARY OF DEFENSE

PRODUCTION & LOGISTICS

Appendix H

ASSISTANT SECRETARY OF DEFENSE
WASHINGTON, D.C.. 20301-8000

PRODUCTION AND LOGISTICS DOD 4160.21-M

23 Mar 90

FOREWORD

This manual is used under the authority of DoD Directive 4160.21, "DoD Personal Property Utilization and Disposal Program." Its purpose is to set forth DoD policy and prescribe uniform procedures for the reutilization and marketing of DoD personal property. Except where otherwise indicated, this manual is applicable to all elements of the DoD and their subordinate commands, installations, and activities.

DoD 4160.21-M is retitled "Defense Reutilization and Marketing Manual." It is restructured to reflect a renumbering of chapters to provide an orderly sequence of reutilization and marketing procedures for personal property of DoD Components.

Recommended revisions to this manual should be submitted through proper DoD Component channels to:

Director
Defense Logistics Agency
ATTN: DLA-SMP
Cameron Station
Alexandria, Virginia 22304-0100

DoD components may obtain their copies of this manual through their publication channels. Other Federal agencies and the public

may obtain copies from HQ Defense Logistics Agency, ATTN: DLA-XPD, Cameron Station, Alexandria, Virginia, 22304-0100.

s/ Diane K. Morales
Diane K. Morales
Deputy Assistant Secretary
(Logistics)

This manual supersedes DoD 4100.21-M, 15 Sep 82, and Changes 1 through Q.

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CHAPTER 1

INTRODUCTION

A. GENERAL. This manual implements DoD directives and instructions which affect the *reutilization* and *marketing* of personal property and takes precedence over conflicting instructions.

B. PURPOSE.

1. The purpose of this manual is to prescribe the policies and procedures to be followed by DoD installations worldwide *for* the *reutilization and marketing* of excess, surplus, and foreign excess personal property and other categories of property as covered here.

2. The policies and procedures in this manual take precedence over conflicting instructions in Defense Agency and Military Service regulations.

C. SCOPE AND APPLICABILITY.

1. The contents of this manual are applicable to all elements of the DoD, their subordinate commands, installations, and activities, worldwide, except as otherwise indicated. It applies to the reutilization and final disposition of supply system stocks, excess, surplus and foreign excess personal property, and other property as authorized.

2. Unless otherwise stated, this manual is not applicable to:

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a. Items under management control or the Defense Nuclear Agency in Federal Supply Group 11; all Department of Energy (DoE) special design and quality controlled items; and all DoD items designed specifically for use on or with nuclear weapons (identified by manufacturers' codes 57991, 67991, 77991, and 87991 in the Defense Logistics Services Center master item file). *These items* shall be processed in accordance with Technical Publication, Supply Management of Nuclear Weapons Materiel. DoE-DNA TP 100-1. Navy SWOP 100-1. Army TM 39-10-0-1. Air Force T.O. 11N- 1DO-1.

b. Cryptologic Materiel. This materiel shall be processed in accordance with NACSI 2001 (FOUO) and NSA Circular 60-5(C).

c. Naval Nuclear Propulsion Plant Materiel. This materiel shall be processed in accordance with NAVSEAINST C5511.32 and SPCCINST 4440-376H as stated in *paragraph B69, Chapter VIII, Property Requiring Special Processing.*

d. Contractor Inventory and Army Corps of Engineers Civil Works Property. *When considered to be in the best interest* of *the U.S. Government, the services of Defense Reutilization and Marketing Offices (DRMOs) and Defense Reutilization and Marketing Regions (DRMRs) may be used.*

e. *Automation Equipment (AE) items under the management control of the Defense Automation Resources Information Center (DARIC).*

D. OBJECTIVES. Personal property (including scrap) shall be *reutilized* or disposed of in a manner that ensures maximum use to satisfy valid needs, permits authorized donations, obtains

optimum monetary return to the U.S. Government for property sold, *protects the environment,* and minimizes the need for abandonment or destruction. The procedures, codes and uniform formats of the Military Standard Data Systems, Military Standard Requisitioning and Issue Procedures (MILSTRIP), Military Standard Transaction Reporting and Accounting Procedures (MILSTRAP), etc., shall be used to the maximum extent possible in all property *reutilization* and *marketing* transactions. Precious metals bearing scrap and end items containing precious metals shall be disposed of in a manner which will assure cost effective disposition and recovery of precious metals when economically feasible under the Precious Metals Recovery Program. Military Service excesses containing components required to offset buy, budget, and repair needs shall be reclaimed before disposal.

1. Donation.

a. Donation of personal property in the *United States*, American Samoa, Guam, Puerto Rico, TTPI, and the *Virgin Islands* shall be made to eligible donees after it has been determined through the reutilization screening process, that no Federal need exists for the property.

b. Donation of foreign excess property shall be made under authority contained in 40 U.S.C. 512 and as further carried out in this manual.

2. Sale. Personal property shall be advertised for sale only after prescribed *reutilization, transfer,* and *donation* actions have been taken. *Defense Reutilization and Marketing Service (DRMS)* shall employ the most efficient and economical methods of identifying, segregating, merchandising, and selling personal property.

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a. Sale of personal property in the *United* States. American Samoa, Guam, Puerto Rico, TTPI, and *the Virgin Islands* shall be conducted as authorized and prescribed in this manual, under authority delegated to the Secretary of Defense by the Administrator of General Services.

b. Sale of personal property in overseas areas (other than named in subparagraph D2a) shall be conducted by the Defense Logistics Agency (DLA) under authority delegated by the DoD, and as prescribed in this manual. Sales in nonexempted overseas areas shall be subject to security trade controls issued by the *Deputy Under Secretary of Defense (Trade Security Policy) (DUSD(TSP)), as* set forth in this manual.

c. Withdrawal *from Sale.* As a general policy, property once advertised for sale may not be withdrawn. Exceptions to this general statement shall be permitted only when property involved is required in support or approved U.S. Government programs, and the action is determined to be in the best interest of the U.S. Government. Heads of DoD components shall ensure that this withdrawal authority is stringently controlled and applied. (This policy is predicated upon the workload and adverse public relations, up to and including court cases, which result unless careful control is placed on withdrawals.)

3. Coordination. Coordination shall be made with:

a. The Department of State, or the U.S. Diplomatic Missions in the country or countries concerned, regarding the *reutilization and marketing* of personal property in foreign countries to assure conformance with United States foreign policies.

b. The Department of the Treasury, relative to the acceptance of foreign currencies in payment for personal property.

c. The Bureau of Domestic Business Development, Department of Commerce, concerning proposed sales or personal property which could have an impact on United States markets.

d. The Department of Justice to obtain antitrust advice on certain sales as prescribed in this manual. Instances of suspected collusion shall be referred to the Department of Justice or the Department of State representative.

e. The Military Services Defense Agencies, and the General Services Administration (GSA) when changes to this publication are proposed.

4. Demilitarization. Personal property shall be demilitarized in accordance with policy and procedures covered in DoD 4160.21-M-1, Defense Demilitarization Manual.

5. Classified Material. Items which are classified may not be released to a *DRMO* for final disposition until they have been declassified in the manner prescribed by the owning DoD component.

6. Abandonment or Destruction. Personal property which cannot be disposed of through authorized sale or donation procedures may be abandoned or destroyed as set forth in this manual.

a. Abandonment or destruction of property may not be accomplished in a manner detrimental or dangerous to public

health, safety, or the environment, or which may cause infringement on the rights of others.

b. *Before* any abandonment *action is taken* of foreign excess personal property, the advice or the local representative of the Department of State must be obtained to prevent, in particular, the possibility of such property falling into the hands of individuals or firms intending to put it to uses *unfavorable or harmful* to the interests of the United States.

c. Personal property shall be donated under authorized surplus and foreign excess property *donation* procedures in preference to abandonment or destruction.

7. Precious Metals Recovery. Precious metals contained in scrap or other personal property shall be recovered for *DoD* use or as Government furnished material (*GFM*). *Policy and procedures for the recovery of precious metals are contained in Chapter X, Precious Metals Recovery Program.*

8. Reclamation. Components contained in Military Service excesses shall be reclaimed to fill internal service needs or interservice/ Defense Agency needs as prescribed in *paragraph A, Chapter IV. Interservice Utilization of Supply System Stocks.*

9. Environmental Considerations. Guidance concerning environmental considerations in the disposal of hazardous property is included in *Chapter IX, Hazardous Property Management.*

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E. PERSONNEL AND TRAINING.

1. Selection of Key Personnel. Exceptional care shall be exercised in the selection and assignment of personnel to property *reutilization* and *marketing* functions. The magnitude of the *reutilization* and *marketing* program and its effects on public relations require that only qualified personnel be assigned to this program. The duties and responsibilities attendant with *reutilization and marketing* positions require that key personnel possess more than an average amount of ingenuity, aggressiveness, conscientiousness, and diplomacy, and that they be well versed in DoD personal property *reutilization and marketing* policy, regulations, and procedures.

2. Training.

a. Property *Reutilization and Marketing* Personnel.

(1) To provide for a more effective career program for functions relating to the *reutilization and marketing* or excess, surplus, and foreign excess property, training is of great importance.

(2) The magnitude of importance of the *reutilization and marketing* program requires that key personnel connected with the program receive training in the field or property *reutilization and marketing*, related technical *areas, safety, environmental protection,* administration, and management.

b. Formal training in the area of *reutilization* and *marketing* is covered in DoD Directive 5010.16, Defense Management Education and Training Program.

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F. CONFERENCES.

1. Conferences are invaluable to *exchange ideas*, *resolve differences and* problems, and *to discuss* other matters of mutual interest to conferees, as well as for an interchange of views in order to develop and nurture mutual understanding among the participants. With the increased magnitude of property *reutilization and marketing*, operating procedures must be reviewed continually to assure they are focused in the proper direction to ensure standardization. Due to the nature of the *reutilization* and *marketing* program, which requires dealing with the general public, it is extremely important that problems as they arise are recognized and acted upon to avoid incidents which are not in the best interest of the U.S. Government.

2. *Reutilization and marketing* conferences shall generally be of a specialized nature depending upon the functions and responsibilities or the organization convening the conference. DLA shall hold conferences for its representatives *and* Military Service/ Defense Agency representatives to discuss areas of common concern *and resolve differences.* Air Force shall chair a DoD Reclamation Work Group, consisting of representatives from each Service and DLA, concerning DoD aircraft, aircraft engines, and end item reclamation policy and procedures.

3. Guidelines for property *reutilizaton* and *marketing* conferences are as follows:

a. Any entity may request a conference be convened.

b. Conferences shall be of the working type, with a minimum of formal presentation and a maximum or open exchange of thought through discussion or agenda subjects.

c. The organization convening the conference shall ensure an agenda is developed and submitted to the next higher management echelon for review, when pertinent, before publication. Participation by entities outside DoD (such as, representation of Federal civil agencies or private industry) depends upon the scope and type of conference. Conference sites shall be selected with consideration of minimizing travel. The length of conferences shall be predicated upon the subject matter and scope of participation.

d. Type and frequency of conferences.

(1) Defense Logistics Agency — as required. Participation shall include *reutilization* and *marketing* personnel from HQ DLA, DRMS, selected DRMRs, representatives from Army, Navy, Air Force, Marine Corps, Coast Guard, Defense Agencies and *when* necessary, representatives of other Government agencies.

(*2*) Air Force — annual or more often as necessary. Participation shall include the DoD Reclamation Work Group members and other participants as considered pertinent.

e. Summary of Conferences. A summary shall be made available to the headquarters concerned and all participants after the completion of a conference. The summary shall outline each subject discussed and state the resultant conclusions.

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CHAPTER II

RESPONSIBILITIES

A. GENERAL.

1. The Federal Property and Administrative Services Act of 1949, as amended (Act of 30 June 1949, 63 Stat. 377, 40 U.S.C. 471), assigned the responsibility for the supervision and direction over the disposition of excess and surplus property to the Administrator of General Services. The Act further assigned the responsibility for supervision and direction over the disposition of DoD foreign excess property to the Secretary of Defense.

2. The Administrator of General Services delegated to the Secretary of Defense the responsibility for the disposition of excess and surplus property generated by the DoD.

3. The Secretary of Defense has assigned to the Director. DLA responsibility for the administration of the DoD Personal Property *Reutilization* and *Marketing* Program and the DoD Precious Metals Recovery Program.

B. RESPONSIBILITIES OF DEFENSE LOGISTICS AGENCY (DLA).

1. Administer the DoD Personal Property *Reutilization* and *Marketing* Program worldwide in the role of integrated program manager and administer the Precious Metals Recovery Program.

2. Establish, coordinate and supervise policy, system concepts and requirements, resource management, program guidance, budgeting and funding, training and career development,

management review and analysis, *internal control* measures, and schedule crime prevention surveys relatable to the DoD Personal Property *Reutilization* and *Marketing* Program and the Precious Metals Recovery Program.

3. Apprise the Assistant Secretary of Defense *(Production* and Logistics) (ASD(P&L)) of progress and significant developments within the DoD Personal Property *Reutilization* and *Marketing* Program and the Precious Metals Recovery Program.

4. Maintain the DoD 4160.21-M in a current status to reflect policy guidance prescribed, by the ASD(*P&L*) or other organizational elements of the Office of the Secretary or Defense, Coordinate changes to the DoD 4160.21-M, before publication, with the Military Services, other DoD components, and Federal civil agencies when the proposed change affects their areas of responsibility or operation; refer to the ASD(*P&L*) with pertinent comments unresolved nonconcurrences with proposed changes. As an objective, change action to this manual shall be initiated not less frequently than on a semiannual basis.

NOTE. Interim instructions reflecting new/revised policy *shall be issued after proper coordination has been obtained.* These issuances shall *be coordinated in the some manner as formal changes to this manual.*

5. Promote maximum *reutilization* of excess, surplus, and foreign excess personal property.

6. Establish/disestablish Defense *reutilization* and *marketing* organizations under the control of the DLA and coordinate such action with the Military Services and other DoD components when

it will affect the disposal support currently being provided their activities. Except when diplomatic considerations do not permit it in overseas areas, this formal coordination shall be accomplished in sufficient time for the Military Service or other DoD components affected to properly program and acquire resources, in accordance with prescribed procedures. Coordinate such establishment/ disestablishment with ASD (*P&L*).

7. Administer the DoD donable surplus personal property program as it applies to approved Service Educational Activities. *This* includes such actions as prescribing procedures, development of donation agreements, and processing requests to higher authority for deviation from formal agreements.

8. Assure maximum compatibility between documentation procedures, codes, and formats used in property *reutilization* and *marketing* systems and the military standard systems.

9. Program, budget, fund, account, allocate, and control personnel spaces and other resources for its respective activities.

10. Prepare and distribute reports as prescribed.

11. Assume the worldwide disposal of all DoD hazardous property except for those categories specifically designated in paragraph B1. *Chapter IX. Hazardous Property Management. (DLA may perform a sale/ultimate disposal service on a case-by-case basis. In these cases, specific funding shall be confirmed in writing.)*

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C. RESPONSIBILITIES OF THE MILITARY SERVICES.

1. Recommend *to the Director, DLA, for action* policy and procedural changes, and participate in decision-making processes pertaining to the DoD Personal Property *Reutilization* and *Marketing* Program and the DoD Precious Metals Recovery Program. Information copies of such recommendations shall be furnished to the ASD(*P&L*).

2. Provide assistance to the Director, DLA, upon request, in the resolution of mutual problems within the DoD Personal Property *Reutilization* and *Marketing* Program and the DoD Precious Metals Recovery Program.

3. Furnish to the Director, DLA, mutually agreed upon data necessary to administer the DoD Personal Property *Reutilization* and *Marketing* Program and the DoD Precious Metals Recovery Program.

4. Promote maximum *reutilization* of supply system stocks, excess, surplus, and foreign excess personal property and *fine* precious metals for internal use or as GFM.

5. Nominate schools or organizations in the *United States.* American Samoa, Guam, *Puerto Rico, TTPI,* and *the Virgin Islands* to the ASD(*P&L*) for special interest consideration as Service Educational Activities.

a. Recommend to ASD(*P&L*) categories of property considered usable by, and necessary for, Service Educational Activities.

b. Inspect annually the property administration of schools or organizations sponsored by the Military Service to assure compliance with the donation agreement, and specifically to review categories and quantities of property received to assure that only that type and quantity of property actually needed is acquired. National organizations such as Boy Scouts and Boys Clubs are exempt from the annual inspection requirement of the Military Services.

6. Provide support to tenanted *DRMRs* and their field sales offices, and *DRMOs*, under applicable interservice support agreements. Except when diplomatic considerations do not permit it in overseas areas, the disestablishment of the host of one of these offices shall be formally coordinated with DLA to properly plan and program the realignment of *reutilization* and *marketing* support which should occur as a result of the disestablishment.

7. Accomplish the disposal of property not authorized by this manual for transfer to a disposal account.

8. Participate in the Precious Metals Recovery Program to the maximum extent, and:

a. Maintain a focal point to coordinate on all matters pertaining to the Precious Metals Recovery Program.

b. Maximize the use of *fine* precious metals for authorized internal use or as GFM.

c. Identify the type, quantity, and location of the precious metal contained in the *item management assigned assets*. Notify DLA in order that such items may be included in the Federal Catalog records.

d. Operate recovery equipment currently under their purview, and additional equipment, if required, when jointly agreeable and approved by DLA. Perform maintenance which can be accomplished by operator or activity maintenance personnel for equipment they operate. Advise DLA when major repairs or services are needed and skills or parts are not available at the local activity for equipment they operate. Recommend to DLA when replacement equipment is needed to maximize recovery efforts.

e. Transfer precious metals-bearing material to the nearest *DRMO* or, when jointly agreeable or approved by *DRMS-OCP* and subject to receipt of fund citation from *DRMS-OCP,* ship to other collection or recovery activity designated by *DRMS.*

f. Assist in the identification of additional generating activities within DoD and report to DLA.

9. Conduct property *reutilization* and *marketing* training courses (Army only).

10. Administer reclamation programs and accomplish reclamation of needed items from Military Service excess material.

11. Store and reclaim excess complete aircraft (Air Force only).

12. Administer the reclamation and removal of equipment and spare parts from stricken naval vessels (Navy only).

13. Establish and administer disposal accounts, as jointly agreed to by DLA and the Military Services, to support the

demilitarization and reclamation functions to be performed by the Military Services.

14. Report surplus merchant vessels or vessels of 1500 gross tons or more, capable of conversion to merchant use, to the Office of *Management* Services (*Code MAR-310),* Maritime Administration. U.S. Department of Transportation, *400 Seventh Street SW., Washington, DC* 20590.

15. Establish the program and direct operations related to lumber and timber products.

16. *Dispose of hazardous property specifically designated in paragraph B1, Chapter IX, Hazardous Property Management.*

D. RESPONSIBILITIES OF DEFENSE REUTILIZATION AND MARKETING SERVICE (DRMS).

1. Exercise program management and staff supervision of the DoD Personal Property *Reutilization and Marketing* Program.

2. Manage the assigned DoD screening systems for screening excess personal property within the Military Services, Defense Agencies and eligible foreign countries.

3. Release DoD excess personal property to GSA for Federal civil agency screening as provided in *Chapter XI, Reutilization Screening of Excess Personal Properly.*

4. Assure donation policies and procedures *are carried out.*

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5. *Carry out* policies and develop procedures and techniques for publication here or in other approved media after coordination by HQ DLA with the Military Services.

6. Maintain and control the consolidated DoD bidders list and serve as the DoD focal point for inquiries pertaining to the sale of disposable property.

7. Develop and administer a system for controlling in consonance with DLA system requirements and accounting for all disposable property.

8. Develop, compile, and publish pertinent data relating to the *reutilization, donation, and marketing* of excess, surplus, and foreign excess property.

9. Act as the principal advisor and assistant to DLA in administering the implementation of the DLA Programs for Protective Services, Personnel and Information Security as related to the DoD Personal Property *Reutilization and Marketing* Program.

10. Develop programs for surveillance of disposable property and related operations to assure optimum *reutilization,* proper demilitarization, and performance of functions under pertinent regulations.

11. Manage the *DRMRs,* including control and distribution of approved resources (such as, personnel and facilities) and procedures.

12. Operate the Precious Metals Recovery Program.

13. Maintain and publish the Directory of DoD *Reutilization* and *Marketing* Program Contact Points. Changes shall be issued as required, but as a minimum annually.

14. Maintain effective liaison and take coordinated actions, through proper channels, to assist in resolving, eliminating, or reducing operating problems.

15. Prepare and distribute reports as prescribed.

16. Dispose of hazardous property as delegated by DLA.

E. RESPONSIBILITIES OF DEFENSE REUTILIZATION AND MARKETING REGIONS (DRMRs).

1. Exercise operational supervision of assigned *field* sales offices, and *DRMOs*.

2. Perform centralized support service functions needed for operational control, coordination, and administrative support to include coordination of civilian personnel administration and training, and coordination of the interservice support agreements.

3. Perform surveillance and give technical assistance to *DRMOs* to assure performance of functions in accordance with regulations. In addition, review DRMO operations to ensure proper identification of Munitions List *and Strategic List* items and that related demilitarization functions are done.

4. Monitor property accountability, appoint Accountable Property Officers, and approve adjustments/corrections to property accounts for assigned *DRMOs*.

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5. Monitor *DRMO* excess reporting and physically screen, as necessary, any property located at the *DRMO* to promote *reutilization* of excess property.

6. Furnish technical guidance in all areas of property *reutilization* and *marketing* to *DRMOs*.

7. Prepare sale solicitations, conduct sales, and execute and administer all sales contracts including the processing of disputes, protests, and claims pertaining to sales and sales contracts.

8. Comply with implementing guidance relative to relationships with Commanders of Unified Commands as prescribed in DoD Directive 5105.22, *Defense Logistics Agency* enclosure 2. (Overseas only.)

9. Assume responsibility for integrated management of disposable *Military Assistance Program* (MAP) property. (Overseas only.)

10. Maintain a "Central Unit" to implement and monitor guidance on the DoD Security Trade Control Program (DoD Instruction 2030.6. *Implementing Procedures for Security Trade Controls on Sales for Foreign Excess Personal Property, and DoD Directive 2030.7, Security Trade Controls on DoD Personal Property Sold in Foreign Areas).* (Overseas only.)

11. Monitor *DRMO* operational aspects of the Precious Metals Recovery Program within assigned geographical areas *and provide support through Disposal Service Representatives, to DoD and participating Federal civil agencies.*

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F. RESPONSIBILITIES OF DEFENSE *REUTILIZATION* AND *MARKETING* OFFICES *(DRMOs).*

1. Provide technical assistance (such as, explanation of turn in procedures, training in scrap segregation practices) to generating activities, not in conflict with this manual, military standard procedures, or other regulations.

2. Receive excess, surplus, foreign excess, nonsalable materiel, and other authorized turn ins from generating activities.

3. Maintain property accountability and control or DLA property *reutilization* and *marketing* assets and furnish input for establishment and updating of centralized accounting record.

4. Maintain adequate liaison with generating activities to ensure visibility of generations to avoid unmanageable fluctuations in workload.

5. Inspect and classify property; verify identity and quantity; determine disposal condition code and process for *reutilization* and *marketing actions*.

6. Provide storage for property and assure that stored property is properly protected and secured.

7. Represent their parent agency in matters pertaining to established interservice support agreements and coordinate with local installation personnel in resolving matters or mutual concern.

8. Promote and ensure maximum conservation of strategic and critical materials and precious metals.

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9. Conduct periodic physical inventory of disposable property on hand; prepare inventory adjustment documents when required.

10. Provide for screening of excess and surplus property.

11. Provide technical and management assistance to all authorized screeners, donees, and other interested persons.

12. Accomplish authorized transfer of property to DoD and Federal civil agencies.

13. Process approved donation requests and release property to authorized donees.

14. Perform research to determine market potential of property available for sale.

15. Coordinate with the *DRMRs to* promote effective marketing techniques in the sale of property.

16. Segregate, lot, display, and describe property in accordance with good merchandising practices and techniques.

17. Identify and segregate scrap and manage scrap operations in accordance with recognized practices.

18. Prepare and submit listings of property for sale and recommend the method of sale when pertinent. Recommend special conditions for unusual requirements or restrictions for inclusion in the sale as applicable.

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19. Promote and conduct, as authorized by the servicing *DRMR*, local sales to *expedite the process* of removal of property if inclusion in regional or national sales *would not be advantageous*.

20. Conduct retail sales or property as authorized.

21. Provide technical assistance to prospective purchasers.

22. Assure that demilitarization or destruction of surplus or foreign excess personal property is accomplished as required.

23. Release property to buyers upon receipt of proper documentation.

24. Provide assistance to Sales Contracting Officers as required to administer the terms of the sale.

25. Deposit sale proceeds and other funds received, including storage charges.

26. Supervise operations of its field offices.

27. Accomplish demilitarization of inert Munitions List *and Strategic List* items that must be demilitarized before disposal.

28. *Where local demilitarization is not feasible*, prepare, package, and crate small arms weapons and parts for shipment to Rock Island for demilitarization in accordance with DoD 4160.21-M-1. and DoD 5100.76-M, Physical Security of Sensitive Conventional Arms, Ammunition, and Explosives.

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29. Promote the DoD Precious Metals Recovery Program and:

a. Accept excess/surplus precious metals-bearing material from DoD components and participating Federal *civil* agencies in their areas.

b. Process such material in accordance with Precious Metals Recovery Program operating procedures contained in Chapter X, Precious Metals Recovery Program.

c. Maintain liaison with generating activities so that technical assistance can be given as needed.

d. Accept custodial responsibility for silver recovery supplies and equipment in their possession.

e. Supervise, in conjunction with the *DRMS-OCP*, precious metals recovery operations of subordinate field offices.

f. Operate silver recovery equipment at *DRMOs* which are assigned central silver recovery responsibilities for hypo, perform maintenance, and identify and recommend repair parts and services needed to maximize recovery efforts.

G. RESPONSIBILITIES OF DEFENSE *REUTILIZATIONS AND MARKETING REGION PACIFIC (DRMR-P) FIELD OFFICES.* As *DRMR-P* extensions, they are responsible for the following within designated countries:

1. Represent *DRMR-P* Commander as point of contact in relations with Unified Commands, Service components, MAAGs, U.S. Embassy, and foreign government sales missions.

2. Perform supervision and procedural direction of the property *reutilization and marketing* operations.

3. Perform supervision and procedural direction in *reutilization*, marketing, and sales.

4. Perform physical assistance and operational review of assigned property *reutilization* and *marketing* operations.

H. RESPONSIBILITIES OF DEFENSE PRECIOUS METALS RECOVERY FACILITY *(PMRF-XE). This facility is responsible for collection of precious metals-bearing property, such as batteries, high purity precious metals scrap, film, and silver recovery cartridges. The facility also performs assays of materials to determine precious metal content. Full responsibilities of the PMRF-XE and other special assignments relating to precious metals recovery are contained in Chapter X, Precious Metals Recovery Program.*

I. RESPONSIBILITIES OF INVENTORY CONTROL POINTS (ICPs)

1. Assure maximum reutilization of property located in the DRMOs.

2. Prepare and forward interrogations to other ICPs in accordance with *Chapter IV, Interservice Utilization of Supply System Stocks.*

3. Process other ICP interrogations/requisitions (fill/kill) for requirements assigned a *Uniform Material Movement and Issue Priority System* (UMMIPS) Priority Designator falling within Issue

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Priority Group 1 (Priorities 01-03) considering on-hand assets to the same extent it would to satisfy its own Service requisitions.

4. Prepare data, reports, and recommendations as prescribed here and maintain backup materiel for audit review.

5. Provide *DRMS* with points of contact for policy and operational matters, such as: Reutilization, Donation, Demilitarization, Precious Metals, Hazardous Property.

6. Identify items that must be demilitarized and accomplish demilitarization of those items which cannot be physically accepted by a *DRMO* in accordance with DoD policy.

7. Assure the submission of available technical data needed in preparing specialized offers and reclamation requirements, when requested.

8. Identify items that need reclamation and, as applicable, advise Military Service/ Defense Agency ICPs/*Integrated Materiel Managers* (IMMs) of items considered to have reclamation potential.

9. Prepare and forward reclamation transactions for the interservice interchange of data for component parts with reclamation potential.

10. Process reclamation notifications/data interchange transactions of other ICPs.

11. Participate in all other programs specified at this manual.

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CHAPTER VI

RECEIPT AND HANDLING OF PROPERTY AT DEFENSE *REUTILIZATION* AND *MARKETING* OFFICES

A. LOCATION.

1. A suitable location, *separate and apart from host installation active stocks,* shall be established at each *DRMO* for the receipt and storage of excess, surplus, or foreign excess *personal* property. This area shall be of sufficient size to permit proper segregation or material and should be convenient to a road net and railroad siding. The *DRMO* shall be responsible for warehousing or otherwise storing all property physically received and shall be responsible for:

a. Administering the established locator system for all property under the control of the *DRMO.*

b. Property segregation bins or areas prominently marked, labeled, or tagged so as to be readily identifiable with the proper locator record. Property should, to the extent practicable, be baled, boxed, bundled, bagged, binned, or otherwise stored to prevent mixing and to facilitate handling and accessibility.

c. Separate storage locations when sufficient space, covered and open, is available for property that must undergo centralized and local area screening. Sale of property should be conducted from these locations to avoid double handling of property.

d. Adequate covered storage space for the protection from the elements of such items as papers, textiles, and other sensitive items of property. Materials shall be stored so as to prevent contamination or mixing and to be readily accessible for inspection.

e. Hazardous waste storage facilities operated by DRMO, meeting all applicable environmental standards and requirements, including the requirements of RCRA, as amended, and the National Environmental Policy Act (NEPA).

2. The organizational elements of a *DRMO* shall be positioned so that the flow of materials and paperwork is orderly from the time of receipt to ultimate disposal.

a. The receiving section should be located near the entrance to the *DRMO* warehouse or yard *for convenience in* property verification so that the property may be directed to a prearranged storage location. *DRMOs* should encourage generating units to furnish advance copies of the DTID, or other documentation to permit preplanning for storage purposes.

b. The storage location for scrap property shall be separate from that of usable property and should be situated near railroad facilities, if available. Truck scales for weighing the scrap should be located adjacent to the receiving section. Railroad scales should also be made available where possible.

c. Property appearing on a *sale solicitation (catalog)* and property awaiting sale shall be separated by signs from property being screened for *reutilization, transfer,* or donation to eliminate confusion on the part of inspecting bidders and screeners.

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B. FACILITIES AND EQUIPMENT REQUIREMENTS.

1. Equipment. The host activity shall furnish the *DRMO maintenance support of operating equipment and vehicles. Use of available equipment and vehicles to support both normal and temporary needs shall be obtained from the host as available.* This support shall be identified in an *ISA.*

2. Facilities. The host activity shall furnish the DRMO such facilities as are necessary to do the assigned *reutilization and marketing* mission. *All DRMO facilities are owned by the host and shall be identified in an ISA. Host site approval must be obtained for all facility improvement projects. Nonreimbursable host maintenance and repair support, not exceeding that prescribed by the regulations of the host activity, shall be included in the ISA.*

C. SAFEGUARDING MATERIAL. The *DRMO* yard shall be fenced or otherwise protected to ensure that materials are safeguarded against theft, pilferage, or unauthorized withdrawals. *Support to DRMOs on security matters is covered in ISAs among investigative agencies and implementing security regulations of the Military Services Defense Agencies.*

D. DISPOSAL PROCESSING.

1. The *DRMO* is responsible for *reutilizalion and marketing* of all DoD generated excess, surplus, and foreign excess, and other personal property authorized for turn in (excluding nonsalable property) except those specific categories *identified* in subparagraph D2 below.

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a. The *DRMO* shall physically accept and process property for which it has *reutilization* and *marketing* responsibility. There are, however, certain categories *of* property, *such as radioactive materiels (see paragraph B, Chapter VIII, Property Requiring Special Processing),* which the *DRMO may* not accept physically based upon special storage or special handling *needs. When this occurs* accountability shall be accepted by the *DRMO and the property* processed for *reutilization, transfer, donation,* and sale actions even though the property physically remains in place. Accountability of property which is not *reutilized* or sold *may* not be returned to the generating activity. *Hazardous property shall be disposed of on hazardous waste service contracts. Other* property shall be downgraded to scrap, processed for abandonment or destruction, or disposed of by service contract. Where the *DRMO* lacks resources or the technical expertise to physically handle property for which *it* has *reutilization and marketing* responsibility, *the DRMO* shall arrange for such support with the local host installation or the generating activity on a case-by-case basis. Reimbursement shall be as shown in *the* existing *ISA* and related governing documents.

b. The following types of property may not be physically accepted by any *DRMO* regardless or *its* resources or technical expertise unless specifically authorized by DRMS.

(1) Live animals.

(2) Explosives and ammunition.

(3) Incendiary products.

(4) Drugs, biologicals, and controlled substances.

(5) Nitrate base film.

(6) Psychodiagnostic test sets.

c. Acceptance or physical custody of hazardous material shall be determined based upon the guidelines in paragraph C. *Chapter IX, Hazardous Property Management.*

2. The *DRMO* may not accept (either physically or on *its* account) the following categories of property and *no reutilization* or sale service *shall be given.*

a. Radioactive waste, thermal batteries, and unsalable material of a nonhazardous nature; that is, material for which sale or other disposal is prohibited by U.S. law *or Federal* or military regulations. This category includes, but is not limited to classified material. DoD inspection stamps and devices, consecrated religious items, and cryptographic equipment.

b. Hazardous property designated for disposal by the Military Services as stated in *Chapter IX, Hazardous Property Management.*

c. Refuse and trash; that is, post consumer waste material such as litter and rubbish collected by the installation engineer. The collection of refuse and trash is the responsibility of the installation engineer, however, some refuse and trash when properly segregated may possess *reutilization, transfer, donation,* or sale potential. The *DRMO* shall assist the host installation by advising the commander or his *or her* designee or any known possibility to dispose of property through established *DRMO* channels based upon proper segregation techniques. Proper

segregation action shall be performed and monitored by personnel of the host installation, not the *DRMO.*

3. Nonsalable materiel (other than refuse and trash); that is, materiel which has no *reutilization, transfer, donation* or sale value as determined by the *DRMO,* but is not otherwise restricted from disposal by U.S. law *or Federal* or military regulations. The *DRMO is* responsible for accepting and processing this type property and shall ensure that ultimate disposition is by the most economical and practical method possible. The following methods should be considered:

a. The possibility of sale if the property were relotted and readvertised.

b. The possibility of donation under the criteria of *paragraph* C, *Chapter XV, Aban*donment *or Destruction; and paragraph N2, Chapter XVI, Sale, Abandonment, or Destruction of Foreign Excess Personal Property.*

c. The disposal of property in a sanitary fill. A small volume of some types of property may be disposed of through refuse and trash collection service under the existing ISA.

d. Service contract. This method should be applied as a last resort when all other alternatives are not possible or are not economically practicable.

E. TURN IN CRITERIA.

1. *Generating activities shall comply with their Service/ Agency retention and disposal policy and procedures when processing property to the DRMO.*

2. Usable *property shall be turned in as individual line items unless authorized for batch lotting as shown below.* The objective of batch lotting is to reduce the cost, physical handling, and administrative time needed to process the item through disposal. Generating activities are encouraged to batch lot low dollar value property for turn in on a single DTID based upon the following criteria:

a. All *Munitions List and Strategic List Items* that must be demilitarized are excluded.

b. Property that needs special handling as defined in *Chapter VIII, Property Requiring Special Processing,* is excluded.

c. Items designated as critical by the wholesale inventory manager are excluded.

d. *Items determined to be pilferable or sensitive are excluded.*

e. Hazardous property may not be batch lotted.

f. Batch lotted property shall be collected in a container no larger than a standard triwall container or box pallet in one of the following options.

(1) Option 1 — Collect by FSG, line item value of $50 or less. Each container shall bear only those items of the same FSC. The extended dollar value (quantity times unit price) for any individual line item may not exceed $50. This is the most desirable method of batching. Retention of FSC integrity through

planned stock picking will be beneficial during later *DRMO* processing by improving *reutilization, transfer, and donation,* or increasing sale proceeds.

(2) Option 2 — Collect by FSG, line item value of $35 or less. Each container shall bear only those items of the same FSG. The extended dollar value (quantity times unit price) for any individual line item may not exceed $35. This option is less desirable than Option I for *DRMO* processing. However, generating activities may use this option when storage problems or processing constraints override *reutilization, transfer, donation,* and sale considerations.

(3) Option 3 — Collect without regard to FSC or FSG, line item value of $20 or less. Extended dollar value (quantity times unit price) for any individual line item may not exceed $20. This is the least desirable option because of the potential for reduced *reutilization, transfer, donation,* or sale proceeds due to the nonhomogeneous nature of the items in the batch lot. As in Option 2, however, operational conditions may dictate selection of this option. NOTE: Because of special processing needs, eligible Navy Supply Operations Assistance Program (SOAP) and Intrafleet supply Support Operation Team (ISSOT) items shall be batched under this option in individual ship lots regardless of the number of containers/pallets involved.

3. Scrap.

a. The segregation of scrap materials is simplified and the cost of handling is kept to a minimum if materials are separated at the source. Commingling *materials considerably* reduces and, in some instances, destroys the value of the scrap material. As a general policy, segregation of scrap will not be carried beyond

the minimum point necessary to facilitate *reutilization, transfer, donation,* or sale in the best interest of the U.S. Government. Initial segregation of scrap is the responsibility of the generating unit. The *DRMO* shall furnish guidance, and where feasible, containers to the scrap generator at the source. The activity collecting the scrap or waste shall maintain segregation to the delivery point. (See DoD 4160.21-H, Defense Scrap Yard Handbook.)

b. Scrap material generated from explosive and incendiary items and chemical ammunition is considered to be dangerous property and may not be commingled with other types or property. This property shall be processed in accordance with DoD 4160.21-M-1, *and paragraph B35. Chapter VIII. Property Requiring Special Processing.*

4. Delivery to a *DRMO.*

a. The responsibility for expenses incurred in *reutilization, transfer, donation, and sale of excess/surplus* personal property is defined as the point at which accountability is transferred from the generating activity to a *DRMO*/SDPDA. All expenses incurred before acceptance of accountability by a *DRMO/SDPDA* shall be borne by the generating activity. Conversely, all expenses incurred after acceptance of accountability by a *DRMO* shall be borne by DLA and expenses for SDPDAs shall be borne by the respective Military Service. On a case-by-case basis exceptions to this policy may be negotiated at the department level. This policy applies to all generations; such as, appropriation fund property, nonappropriation funded property, industrial funded property, contractor inventory property.

b. Property capable of spilling or leaking may not be transferred to a DRMO/SDPDA in open, broken, or leaking containers.

F. DOCUMENTATION.

1. *Property shall be turned in to the DRMO on a DD Form 1348-1, DTID, with DIC A5J.* Guidance for preparation of a DTID is contained in DoD 4000.25-1-M. appendix C46 (excerpt at attachment 1, this chapter). (Specific guidelines for turn in of hazardous property are found in *paragraph D, Chapter IX. Hazardous Property Management,* this manual. The fallowing is the minimum information that must be on the DTID.

a. Usable Property.

(1) NSN (when assigned to the item). *When a valid NSN is not known, the generating activity shall provide a manufacturer identity code and part number, if known, or best available identifying data, including FSG.*

(2) Nomenclature (noun name as a minimum).

(3) Unit of issue.

(4) Quantity.

(5) Unit acquisition cost.

(6) Supply condition code. (See attachment 2, this chapter.)

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(7) Document number. (Must contain the *DoDAAC* in the first six positions, or other identification of the generating activity when a DoDAAC has not been assigned. Where a DoDAAC has not been assigned, the first position must be a MILSTRIP Service assigned code (alpha) and positions 7 through 14 must include the Julian date and a serial number). *Unless otherwise authorized by the ICP, the document number must be that of the supply, maintenance, or using activity turning the property in to the DRMO. The DRMO shall reject any proposed turn in where the intermediate activity changes the original consignee to that of the DRMO.*

(8) Category of property (such as foreign equity, MAP), and if proceeds are to be deposited to other than the *General Fund Receipt Account,* the reimbursement data to include the account to be credited.

(9) Weight and cube; *estimated, if unknown.*

(10) Value and list of component parts that have been removed *from major end items of equipment or a copy of the Limited Technical Inspection (LTI) form showing the nature and extent of repair required.*

(11) Demilitarization code.

(12) Reclamation requirements data, if applicable.

(13) Disposal authority code.

(14) Precious metals indicator code.

b. Usable property may be batch lotted by the generating activity. Based upon the option selected in paragraph E2, this chapter, the following minimum data must be included on the DTID for each lot.

(1) FSC/FSG followed by the word BATCH. When Option 3 is selected, the NSN field must be blank.

(2) Document numbers. (See subparagraph Fla(7).)

(3) Quantity is optional. If blank, *DRMO* shall estimate.

(4) Demilitarization code *reflecting the strongest demilitarization code of all items in the batch.*

(5) Total acquisition value of the lot is optional. If blank, *DRMO* shall use $2 as the average unit cost per pound.

(6) Shipping point. DoDAAC, or activity in-the-clear address.

(7) Ship to *DRMO,* DoDAAC, or activity in-the-clear address.

(8) Certification as follows: "I certify that this lot is in compliance with current disposal policy" followed by the date, signature, *and printed or typed name of* the certifying individual.

c. Scrap and waste.

(1) Basic material content.

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(2) Estimated weight.

(3) If proceeds are to be deposited to other than the *General Fund Receipt Account,* the reimbursement data to include the account to be credited (such as. Industrial Fund, Nonappropriated Fund).

(4) Document number.

(5) *Precious metals indicator code.*

2. A minimum of four legible copies of the DTID must be furnished the DRMO *and accompany the property. The DRMO shall return to the turn in activity* within 5 working days from receipt *of property* one copy of the DTID as a valid receipt document. *Five legible copies of the DTID* must be furnished to the DRMO if the turn in activity desires an interim "proof or delivery" copy of the document. This copy *may not be used to adjust* accounting records.

G. RECEIPT OF PROPERTY. This paragraph gives uniform procedures for the receipt, handling, and storage of excess, surplus, and foreign excess property.

1. One of the most critical and important stages in the flow of property through the *reutilization and marketing* system is when the property is initially received at the *DRMO.* The *DRMOs* have the responsibility for the receipt, classification, processing, safeguarding, storing, and shipping of all property received. This includes property to be accounted for as items, and properly segregated scrap and waste having a *reutilization, transfer, donation,* or sale value, and material destined for ultimate disposal. The *DRMO* shall give assistance, as requested, in tracing DTIDs

when an intransit control followup has been received by the generating or shipping activity. The *DRMO* must maintain close liaison with the generating activities to ensure that:

a. Scheduling is done *taking into consideration* the *DRMO's* receiving capability and the volume of property to be turned in.

b. Assistance is given to the generating activity when needed to assure proper segregation of scrap and waste material before turn in to the *DRMO.* If the quantities generated, market conditions, or local trade practices warrant further segregation shall be made as outlined in DoD 4160.21-H.

c. Local *DRMO* developed written guidance on disposal turn ins is given to generating activities. Such guidance shall be of an assistance type rather than directive in nature.

d. Inspection of the property is performed in place if it is more advantageous to do so because of the size, weight, or category of the property. Excess property not transferred physically to the DRMO shall be tagged with a status tag indicating the Federal Condition Code and DRMO accountability.

e. Property classified as "condemned" by the generating activity is processed for disposition in accordance with the circumstances on which the classification is based. Material "condemned" solely due to its degree of unserviceability or age (shelf life) may have some use potential and should be processed accordingly.

f. All property (except unsalable), scrap, and refuse and trash with a *reutilization, transfer, donation,* or sale value are being processed as set forth in this manual.

g. No salable property or refuse or trash with *reutilizaton, transfer, donation,* or sale potential is being disposed of by dumping in landfills.

(1) DRMOs shall apprise generating activities of their (the generating activities') responsibility to assure that all salable material is turned in to the DRMO.

(2) If the *DRMO* has knowledge that salable material is being dumped in a sanitary fill, the *DRMO chief* shall initiate a letter to the installation commander regarding the matter.

h. *Property has received proper protection and care in handling before it is transferred to a DRMO, preventing damage from unnecessary exposure to the elements. Property turned in as condemned may still be usable and its preservation may benefit the reutilization and marketing programs. Instances of apparent improper handling of Government property shall be brought to the attention of the generating activity or installation commander for remedial action. Recurrent instances of improper care or handling of property shall be documented for referral to HQ DLA and the Military Services/Defense Agencies.*

2. The receiving and storage segment of the *DRAM* shall:

a. Assure that all property, *including scrap,* turned in to the *DRMO* is accompanied by the needed number of copies of the DTID properly prepared *(see paragraph F2)* and determine

that *special handling* has been given the items covered in *Chapter VIII. Property Requiring Special Processing.*

b. Inspect property upon receipt. Inspection shall consist of verifying property description and quantity and assuring that a valid Supply Condition Code (attachment 2, this chapter) was assigned by the generating activity. A Disposal Condition Code (attachment 3, this chapter) shall be assigned by the DRMO to form a two-digit Federal Condition Code that must be perpetuated throughout the screening process (examples: A2, D9, G7). Inspection checks shall be made to give reasonable assurance that all information relating to the property is factual. *If a discrepancy in a shipment exists, one signed copy of the DTID noting the discrepancy shall be sent to the generating activity within 5 working days from receipt. The generating activity shall initiate action to resolve the discrepancy upon receipt of the receipt copy of the DTID.* If the discrepancy is not resolved within a reasonable period of time, the shipment shall be returned.

c. Property received in place by the *DRMO* is tagged for identification purposes. (Property should be consolidated. physically in a designated area, but may be left in place if this action is determined locally to be justified for economic or other valid reasons.) The activity having physical custody shall be responsible for care and protection of this property until it is disposed of or moved to the *DRMO.*

3. Batch lotting of property may also be accomplished by a *DRMO* after receipt in accordance with internal operating guidance. When this action is taken, the *DRMO* is responsible for ensuring a receipt copy is returned for each DTID received and that assistance is provided in tracing any DTID for which the receipt copy has not been received by the generating activity.

4. Based upon requests from inventory managers for visibility through FES of low dollar value items that are in short supply, long procurement lead time, out of production, and for other reasons. *DRMS* may authorize an exception to the FSG/FSC lotting procedure at the *DRMO.*

5. Generating Activities.

a. Generating activities shall reflect on the DTID all property that must be identified for special processing, such as shelf life, automation equipment, redistributable MAP, hazardous material. (*see Chapter VIII, Property Requiring Special Processing; and Chapter IX, Hazardous Property Management),* as well as property which is authorized for direct reimbursement to a deposit fund account other than the General Fund Receipt Account 97R2651 (such as, nonappropriated fund, industrial fund). DTIDs without special processing or direct reimbursement data shall be processed as normal DoD excess property.

b. Military activities, such as National Guard units, ROTC units, Reserve units *(for U.S. Army, this includes supporting activities that service the Reserve units),* and recruiting offices generating Military Service excess or surplus property which do not have an assigned *DRMO* or agent, shall physically turn in their property to the nearest *DRMO* when economical and feasible. However, arrangements must be made with the *DRMO* to include placing into effect an ISA, when necessary, to assure that adequate facilities and resources exist or can be made available to the *DRMO* to process the additional workload. Where it is impractical or uneconomical to move the property, it shall be referred to the nearest *DRMO,* which in turn shall offer the property for screening and include these items in its own listing when referred to a DRMR, specifying the name and address of

the agency at which the property is located. Exception to the above is authorized where activities are attached to a specific installation for logistical support and delivery of property to the installation is more economical.

c. The DoD, as a service to the DoT, shall process U.S. Coast Guard excess and surplus property located in the *United States, American Samoa, Guam, Puerto Rico, TTPI, and the Virgin Islands.* The principles outlined below shall apply in these processing actions *(See paragraph K8, Chapter XIV, Sales,* for sale proceeds accounting instructions for Coast Guard owned property.)

(1) Coastal Guard excess personal property (except property located in the U.S. Coast Guard Yard, Curtis Bay, Maryland) shall be transferred to the nearest *DRMO* after internal Coast Guard screening is complete. If size or economics prevent physical transfer of property, the Coast Guard shall transfer accountability but retain custodial responsibility for the property.

(2) The Coast Guard district office or the unit having custody of excess property shall advise the *DRMO* of a proposed transfer of excess property. No shipments shall be made to *DRMOs* without notification unless local arrangements to the contrary have been made.

(3) Certain items, such as aircraft, vessels and motor vehicles, may be reported by the Coast Guard direct to the *DRMR* if *reutilization, transfer,* and donation screening, as well as demilitarization, has been completed. Where this option is exercised, the Coast Guard shall do those functions relating to sales (descriptions, releases, etc.).

(4) Documents covering *turn in of property to* DRMOs shall contain the information listed in paragraph F. Transportation of material to the *DRMO* shall be arranged for by the Coast Guard.

(5) Reimbursement *may not be made to* the Coast Guard for excess property *physically* transferred to a *DRMO.*

(6) Requests for onsite inspection or shipment of property retained in Coast Guard custody shall be mutually agreed to by, the *DRMO* and the Coast Guard custodian.

(7) Classified property or property that must be demilitarized (except aircraft) may not be transferred to *DRMOs* as items or as scrap. Processing of this property for disposal shall be the responsibility of the Coast Guard. Coast Guard aircraft may be transferred to the *Aerospace Maintenance and Regeneration Center.* Davis-Nionthan Air Force Base. Arizona, if agreed to in an ISA between the Coast Guard and the Air Force.

(8) Coast Guard excess property not transferred physically to a DRMO and under going *reutilization, transfer, and donation* screening, may not be withdrawn for Coast Guard use without authorization. Requests for withdrawal shall be submitted to the *DRMO* for necessary action.

H. STATUS OF PROPERTY. Property whether usable or scrap, which is *transferred* to the *DRMO,* must be identified clearly as to its current status from the time of receipt until final removal. By clearly identifying the status of property, confusion on the part of *reutilization* and donation screeners and inspecting bidders should be minimized, if not eliminated. Storage areas shall be set aside and the status of the property shall be shown.

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CHAPTER 7

ATTACHMENT I

DISPOSAL TURN IN DOCUMENT ENTRIES

DD Form 1348-1, DoD Single Line Item Release/Receipt Document (Ref. DoD 4000.25-1-M)

Item	*Record Position*	*Identification or Source of Data*
Document Identifier Code	*1-3*	*Perpetuate from source document. For locally determined excesses generated at base, post, camp, or station, assign a DI code as determined by the Service/Agency procedures.*
Routing Identifier Code	*4-6*	*The RI Code of the shipping activity or leave blank when shipping activity is not assigned a RI Code.*
Media and Status Code	*7*	*Leave blank.*

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Item	*Record Position*	*Identification or Source of Data*
Stock or Part Number	*8-22*	*The stock or part number being turned in. For subsistence items enter the Type of Pack Code in rp 21.*
Unit of Issue	*23-24*	*The unit of issue of the stock or part number being turned in.*
Quantity	*25-29*	*The quantity being turned in to DRMO.*
Document Number	*30-43*	*Perpetuate from source document. This cannot be the same document number that was used to receive the materiel. For locally determined excesses generated at base, post, camp,*

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Item	*Record Position*	*Identification or Source of Data*
		or station, assign a document number as determined by Service/Agency procedures.
Suffix Code	*44*	*Leave blank.*
Supplementary Address	*45-50*	*Enter DoDAAC of predesignated cosignee DRMO.*
Signal Code	*51*	*Leave blank.*
Blank	*52-53*	*Leave blank.*
Distribution Code	*54*	*Leave blank.*
Retention Quantity	*55-61*	*Enter the quantity to be retained in inventory or leave blank.*
Precious Metals Indicator Code	*62*	*Enter applicable code (DoD 4000.15-1-M).*

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Item	*Record Position*	*Identification or Source of Data*
APDE Identification Code	*63*	*Enter applicable Identification code (DoD 4000.25-1-M, appe*
Disposal Authority Code	*64*	*Enter applicable Disposal Authority Code see 4000.25-1-M, appendix B26).*
Demilitarization Code	*65*	*Code assigned as required by DoD 4160.21-M-1. When demilitarization has been accomplished by transfer to a DRMO, the demilitarization certificate as required by DoD 4160.21-M-1 must be reflected blocks W-Y)*

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Item	*Record Position*	*Identification or Source of Data*
Reclamation Code	*66*	*Enter Code "Y" if reclamation was performed prior to release to DRMO. Enter Code "R" if reclamation is to be performed after turn in to DRMO. Enter Code "N" if reclamation is not required.*
Routing Identifier Code	*67-69*	*Perpetuate from Delivery Release Order (DRO)*
Ownership	*70*	*Enter applicable code or leave blank.*
Supply Condition Code	*71*	*Enter applicable code (see MILSTRIP, appendix B13)*
Management	*72*	*Perpetuate from source document or leave blank.*

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Item	*Record Position*	*Identification or Source of Data*
Screening Code	*73*	*Leave blank.*
Unit Price	*74-80*	*Enter the unit price for the NSN/part number shown in rp 8-22.*

Block(s)	*Entries*
A	*The shipping point identified by name and DoDAAC.*
B	*The cosignee DRMO by DoDAAC name, and address. This will be the designated consignee DRMO and shall be entered by the generating activity.*
C	*Insert HM, if turn in is hazardous material or HW, if turn in is hazardous waste.*
D	*The category identifying the property as requiring special handling by disposal. These categories are not readily identified by individual nomenclature and must be entered "in the clear" in this block, The listing below is an example of the various categories.*

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Block(s)	*Entries*
	1. Contractor Inventory
	2. Foreign Equity Property
	3. Industrial Fund Property
	4. Radioactive Materiel
	5. Red Cross Property
	6. Redistributable MAP Property
	7. Shelf-Life Property
	8. Nonappropriated Fund Property
	9. Recycling Program Property
E	*The extended value of the transaction.*
F	*The location from which materiel is to be selected, if required by the shipper.*
G	*Coded cargo data, if required by the shipper.*
H	*The number of units of issue in a package, if required by the shipper.*
I	*The unit weight applicable to the unit of issue, if required by the shipper.*

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Block(s)	*Entries*
J	*The unit cube applicable to the unit of issue, if required by the shipper.*
K	*Uniform Freight Clarification, if required by the shipper.*
L	*National Motor Freight Classification, if required by the shipper.*
M	*Freight rate, if required by the shipper.*
N	*For internal use.*
0	*Date of document preparation, if required by the shipper.*
P	*For internal use.*
Q	*The quantity actually (transferred to DRMO, if different from rp 25-29.*
R	*For internal use.*
S	*The quantity actually receipted for by the DRMO.*
T, U	*Self-explanatory.*
V	*Enter mode of shipment code (MILSTAMP, appendix B6), if required by the shipper.*

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Block(s)	*Entries*
W, Y	*1. For non-NSN items, enter as much descriptive information as possible in blocks "W" and "Y", and/or attach additional documentation with these data if needed.* *2. For NSN items, blocks "W"and "Y" shall be used for internal use and block "X" may contain the noun.* *3. Specified additive data or certification required from the generating source for specific types of property should be entered in this space or attached.*
1 thru 6	*Skipper use.*
7 thru 10	*DRMO use.*
AA	*Enter word "NAF" (for nonappropriated fund weapons).*
BB-EE	*Enter appropriation citation to be credited with the proceeds from sale or transfer when reimbursement to a specific fund other than the DLA Deposit Fund Account is authorized. Leave blank if sale proceeds are to be deposited to the DLA Deposit Fund Account.*

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Block(s)	*Entries*
FF-GG	*DRMO use.*
11 thru 15	*For optional use by the DRMO.*

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CHAPTER VI

ATTACHMENT 2

SUPPLY CONDITION CODES

Code	Title	Definition
A	Serviceable (Issuable Without Qualification)	New, used, repaired, or reconditioned material which is serviceable and issuable to all customers without limitation or restriction. Includes material with more than 6 months' shelf life remaining.
B	Serviceable (Issuable Without Qualification)	New, used, repaired, or reconditioned material which is serviceable issuable for its intended purpose but which is restricted from issue to specific units, activities or geographical areas by reason of its limited usefulness or short service life expectancy. Includes material with 3 through 6 months' shelf life remaining.
C	Serviceable (Priority Issue)	Items which are serviceable and issuable to selected customers, but which must be issued before Condition A and B material to avoid loss or as a usable asset. Includes materials with less than 3 months shelf life remaining.

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Code	Title	Definition
D	Serviceable (Test/Modification)	Serviceable material which requires test, alteration, modification, conversion, or disassembly. (This does not include items which must be inspected or tested immediately prior to issue.)
E	Unserviceable (Limited Restoration)	Material which involves only limited expense or effort to restore to serviceable condition and which is accomplished in the storage activity where the stock is located.
F	Unserviceable (Reparable)	Economically reparable material which requires repair, overhaul, or reconditioning (includes reparable items which are radioactively contaminated).
G	Unserviceable (Incomplete)	Material requiring additional parts or components to complete the end item prior to issue.
H	Unserviceable (Condemned)	Material which has been determined to be unservicable and does not meet repair criteria (includes condemned items which are radioactively contaminated).

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Code	Title	Definition
S	Unserviceable (Scrap)	Material that has no value except for its basic material content. No stock will be recorded as on hand in Condition Code S. This code is used only on transactions involving shipments to DRMOs. Material may not be transferred to Condition Code S prior to turn in to DRMOs if material is recorded in Condition Code A through H at the time material is determined excess. Material identified by NSN may not be identified by this Condition Code.

NOTE: For a complete listing of Supply Condition Codes (including those codes not used in *reutilization and marketing)* see DoD *4000.25-2-M, Military Standard Transaction Reporting and Accounting Procedures (MILSTRAP).*

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CHAPTER VI

ATTACHMENT 3

DISPOSAL CONDITION CODES

Code	Title	Definition
1	Unused-good	Unused property that is usable without repairs and identical or interchangeable with new items from normal supply source.
2	Unused-fair	Unused property that is usable without repairs, but is deteriorated or damaged to the extent that utility is somewhat impaired.
3	Unused-poor	Unused property that is usable without repairs, but is considerably deteriorated or damaged. Enough utility remains to classify the property better than salvage.
4	Used-good	Used property that is usable without repairs and most of its useful life remains.
5	Used-fair	Used property that is usable without repair, but is somewhat worn or deteriorated and may soon require repairs.

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Code	Title	Definition
6	Used-poor	Used property that may be used without repairs, but is considerably worn or deteriorated to the degree that remaining utility is limited or major repairs will soon be required.
7	Repairs required-good	Required repairs are minor and should not exceed 15 percent of original acquisition cost.
8	Repairs required-fair	Required repairs are considerable and are estimated to range from 16 percent to 40 percent of original acquisition cost.
9	Repairs required-poor	Required repairs are major because the property is badly damaged, worn, or deteriorated, and are estimated to range from 41 percent to 65 percent of original acquisition cost.
X	Salvage	Property has some value in excess or its basic material content, but repair or rehabilitation to use for the originally intended purpose is clearly impractical. Repair for any use would exceed 65 percent of the original acquisition cost.
S	Scrap	Material that has no value except for its basic material content.

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CHAPTER VII

ACCOUNTING FOR PROPERTY IN *REUTILIZATION AND MARKETING*

A. GENERAL.

1. Documentation. Excess, surplus, or foreign excess property turned in or reported to the DRMO/SDPDA shall be accompanied by the specified number of copies of the DTID. Before accepting the material, the receiving segment of the DRMO/SDPDA shall ensure that the document is properly prepared and that the descriptions and quantities listed are accurate. In all cases, records shall be maintained so that an item of property can be traced from receipt to disposal and make available the necessary data for the quarterly report prescribed in *Chapter XVIII, Reports and Forms/Formats.*

2. Segregation and Classification.

a. Property *reutilization and marketing* records must be maintained in sufficient detail to support the reimbursement accounting procedures set forth in *Chapter XIV Sales.* Material may be combined in sale lots regardless of the original financing appropriation or stock fund source from which the material was transferred except for: Foreign equity property; nonappropriated fund property; U.S. Coast Guard aircraft; vessels, boats, and vehicles; and property located at the Coast Guard Yard, Curtis Bay, Maryland. The identity of these exceptions must be maintained throughout the system to ensure reimbursement to the local or departmental account as designated by the Military Services/Defense Agencies. Industrial fund scrap may be physically combined with other scrap when considered

advantageous; however, accounting records shall be maintained to substantiate prorating of the proceeds. When stock fund property is transferred to the *DRMO*, the identity of the property as stock fund need not be maintained in property *reutilization and marketing* records. Such property may be grouped with other types of property when lotting for sale.

b. When end items are turned in to the *DRMO* as scrap and the end items are reclaimed or disassembled for the usable components having further *reutilization, transfer, donation,* or sale value, the records of the *DRMO* shall be adjusted to reflect the acquisition cost (estimated, if not known) of the components removed.

c. When *disposal* condition code X (salvage) property which need not be demilitarized is determined by the *DRMO* to have scrap value only, it may be classified and processed as scrap upon receipt.

d. Repair parts or components of combat vehicles and equipment, and weapons which, in the opinion of the *DRMO*, have no commercial value other than for basic material content, may be downgraded to scrap after the ESD and completion of any required demilitarization.

e. When an item of specific nomenclature has been offered on a competitive sale and no bid has been received, or bids received are less than the scrap value of the item, the property may then be reoffered for scrap and the records adjusted accordingly. Similar items later received within a 12-month period, may be considered as scrap for sale purposes, after screening. When property is offered as an item and the bid price is equivalent to scrap value, it may be accepted for that sale and the *DRMR*

shall request the *DRMOs* within its geographical area to submit after screening, future generations of such property as scrap for sale purposes. This action is acceptable provided it is taken within a 12-month period after the previous sale offering (of the item) and a review by the *DRMR* or *DRMO* of such property shows that marketability remains unchanged.

f. When obsolete printed materials are turned in to the DRMO as usable items with acquisition value, and it is determined that they have no *reutilization, transfer*, or donation potential and only scrap market value, these items shall be expended to scrap upon receipt.

3. Scrap Accounting. Estimated weight may be used for receiving scrap if scales are not available or if weighing is impractical. The degree of accuracy considered acceptable is 25 percent for property sold by the ton, and 10 percent for property sold by the pound. Overages and shortages discovered on release of property which exceed allowable tolerances shall be adjusted.

B. DISCREPANCIES AND ADJUSTMENTS.

1. General Discrepancies in item identification, quantity, condition, or price data which are disclosed before acceptance or accountability shall be resolved and corrected during the receipt process. Any discrepancies which are discovered after acceptance of accountability; that is, differences between recorded balances and quantities on hand shall be processed as inventory adjustment actions. *The procedures for processing inventory adjustment actions are contained in DoD Instruction 4140.35. Physical Inventory Control for DoD Supply System Material and DoD 4000.25-2-M.*

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2. Property not in DRMO Custody. When property for which the DRMO has accountability but has not assumed custodial responsibility becomes lost, damaged, or destroyed, the custodial activity having responsibility for the property shall investigate the circumstances surrounding the discrepancy. The DRMO shall provide the investigating custodial activity with requested item identification number such as NSN and DTID number or copies of documentation pertinent to the item lost, damaged, or destroyed. If the custodial activity investigation determines the discrepancy is due to a record keeping error, it shall inform the DRMO which shall prepare the proper inventory adjustment document as provided in subparagraph B1. If the discrepancy is not due to a record keeping error, the custodial activity having responsibility for the property lost, damaged, or destroyed must prepare a DD Form 200, Report of Survey, according to criteria contained in DoD 7200.10-M, Department of Defense Accounting and Reporting of Government Property Lost, Damaged, or Destroyed. The responsible custodial activity must provide the DRMO a completed copy of the DD Form 200 as supportive documentation for the DRMO to adjust the discrepancy off its accountable records.

C. PHYSICAL INVENTORY AND LOCATION SURVEY. *Usable property* which remains as a debit balance on the DRMO account in excess of 12 months shall be inventoried not later than the 13th month of accountability and reviewed monthly thereafter. Discrepancies disclosed by inventories shall be adjusted (see paragraph B1).

D. AUDITS. When it is desired to obtain or confirm data on material transferred to or from disposal accounts, and this involves crossing command lines, the policy in DoD *Directive 7600.2, Audit Policies,* shall govern. This directive is further implemented

by the Military Services and DLA in AR 36-5, Processing Internal and External Audit Reports and Followup on Findings and Recommendations; SECNAVIST 7510.7C, Department of the Navy Audit Manual for Management; AFR 175-4, Internal Auditing in the Air Force; and DLAR *7000.13*, Internal Review, *respectively.*

d. Items of clothing and individual equipment may not be mutilated by cutting, painting, tearing etc. to prevent reentry into the supply system and to preserve the sale value, items of clothing and individual equipment may be marked by the generating activity when markings are required by the Military Service regulation before turn in to a DRMO. Such markings shall be limited to methods specified in attachment 6, this chapter.

17. Commercial Recovery of Chemical Materials.

a. When it is uneconomical to process chemical solutions containing infinitesimal quantities of recoverable materials, arrangements may be made with commercial firms which offer a recovery service for processing the material on a share basis. Payment shall be based upon a specified percentage of the value of the recovered material. No charge, rental, or deposit shall be paid for this service over and above the share retained by the purchaser.

b. Bids on the sale of materials of unknown value, content, weight, or analysis may be accepted on a share and share basis. Bids shall be evaluated on the basis of the service rendered and the percentage of the share to be paid to the U.S. Government.

c. When materials of unknown value, content, weight, or analysis are sold to recognized firms whose unverified findings become the basis of payment, such findings may be accepted if it is determined to be uneconomical or impracticable to verify their authenticity and if it has been determined that discard of the material would otherwise be necessary.

d. Instructions for the recovery of silver from used hypo solution are contained in *paragraph B96,* this chapter.

18. Communications Crystals. All communications crystals, except those which NSA either manages or is recorded as a user, shall be assigned demilitarization code A (non-MLI, demilitarization not necessary). IMs may not develop systems to mechanically assign code A, but shall assign proper codes on an individual item basis. Generating activities shall remove application data and sensitive markings from all communications crystals and *packaging containing crystals* before turn in to the *DRMOs.*

19. Compressed Gas Cylinders. Generating activities shall turn in, and DRMOs shall process, compressed gas cylinders in accordance with the joint regulation, DLAR 4145.25/AR 700-68/ NAVSUPINST 4440.128C/ MCO 10330.2C/AFR 67-12, Storage and Handling of Compressed Gases and Liquids in Cylinders, and of Cylinders.

20. Concertina Wire, Barbed Tape, and Wire, These items shall be banded or boxed before turnin to the servicing DRMO. Banding or boxing is necessary to prevent disabling or painful injury during loading, unloading operations, and any later handling which may be necessary.

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21. Confiscated Property. Property confiscated by the Treasury Department, Bureau of Customs, or other competent U.S. Government authority, primarily related to military type equipment, except ammunition and dangerous property, may be turned in to a *DRMO* for processing. This property shall be processed by the *DRMO* in the same manner as *Military* Service Defense Agency excess.

22. Containers.

a. General. Provisions of procurement contracts that impose or permit returning of empty containers shall be observed. When containers are not returnable and are received in such quantities and condition as to justify reuse, effort shall be made to accomplish disposal by term contract with the original supplier being given an opportunity to bid. *DRMS may permit* the return of containers released incidental to the sale of property.

b. Cans, Tin, and Aluminum.

(1) Tin cans, unbaled or unbundled, have a very low market value and should be treated as, but not commingled with, an inferior grade of iron and steel scrap. If the volume of generation will substantiate such action, tin cans may be sold by term contract with pickups made directly from mess halls and other generating points.

(2) Aluminum cans, such as are used by the petroleum industry, have a greater value than tin cans and should be segregated and sold separately from tin cans.

c. Produce and Similar Containers.

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(1) Proper care shall be exercised in the opening and handling of boxes, barrels, egg cases, glass, produce containers in order that as many as possible may be saved for reuse. Whenever practicable, such items may be offered on term contract.

(2) Inspection and acceptance stamps or markings on food containers shall be obliterated before disposal.

(3) Burlap and burlap bags shall be reused when possible.

d. Drums, Steel. Empty drums normally deteriorate rapidly because of residual contents, storage location, method of storage, etc. Within the bounds of acceptable disposal and merchandising practices, the drums should be disposed of promptly to obtain maximum return.

e. A container or an inner liner removed from a container that has held any hazardous waste, except a waste that is a compressed gas or that is identified in 40 CFR 261.33(c). is empty if:

(1) All wastes have been removed that can be removed using the practices commonly employed to remove materials from that type of container: such as, pouring, pumping, and aspirating.

(a) No more than 2.5 centimeters (one inch) of residue remain on the bottom of the container or inner liner.

(b) No more than 3 percent by weight or the total capacity of the container remains in the container or inner liner if the container is less than 110 gallons in size.

(c) No more than 0.3 percent by weight of the total capacity of the container remains in the container or inner liner if the container is greater than 110 gallons in size.

(2) A container that has held a hazardous waste that is a compressed gas *shall be processed in accordance with DLAR 4145.25/AR 700-68/NAVSUPINST 4440.128C/MCO 10330.2C/AFR 67-12.*

(3) A container or an inner liner removed from a container that has held a hazardous waste identified in 40 CFR 261.33(c) is empty if:

(a) The container or inner liner has been triple-rinsed using a solvent capable of removing the commercial chemical product or manufacturing chemical intermediate.

(b) The container or inner liner has been cleaned by a scientifically approved method.

(c) In the case of a container, the inner liner that prevented contact of the commercial chemical product or manufacturing chemical intermediate with the container has been removed.

f. Turn In Requirements.

(1) Containers shall be turned in under one of the following categories:

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(a) Nonhazardous containers whose last contents were known to have been a nonhazardous material or containers which previously contained hazardous or acutely hazardous material that have been triple-rinsed with a scientifically approved method or have had the liner removed.

(b) Hazardous containers that have previously contained materials that are hazardous by any Federal or State definition that have not been triple-rinsed with a proper solvent, cleaned by a scientifically approved method or have had the liner removed.

(c) Acutely hazardous containers that have contained residue of any material listed in 40 CFR 261.33(e), unless they have been triple-rinsed with a proper solvent, cleaned by a scientifically approved method, or have had the liner removed.

(2) The DTID for all disposal categories shall reflect the NSN or LSN/FSC of the container itself in record position 8-22 regardless of its previous contents. The NSN/LSN of the container's previous contents must not be used.

(3) Containers must be nonleaking and safe to handle when turned in to a *DRMO*. The containers must be able to withstand normal handling or the turn in shall be rejected.

(4) Containers that have previously held hazardous or acutely hazardous materials and have not been triple-rinsed, cleaned by an equivalent method approved by the EPA Regional Administrator, or have had the liner removed must have all bungs. gasket seals, covers, etc., in place or, as a minimum, totally sealed. Waivers to this policy may be granted on a case-by-case basis by the *DRMO* under the following circumstances:

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(a) Containers shall be transported onsite only.

(b) The generator is adversely impacted by compliance and furnishes the *DRMO* with details (that is, location, description, quantity, and extent of impact).

(c) The *DRAM* has the necessary equipment (such as bungs) to seal the containers upon receipt.

(5) Markings/labels on the containers must be consistent with the DTID.

(6) For nonhazardous containers the turn in activity shall certify in block C of the DTID "NON-HZ". If the container has been triple-rinsed, block C shall reflect "NON-HZ/ triple-rinsed" and the container itself must indicate triple-rinsed.

(7) For hazardous containers the following shall apply:

(a) Block C of the EMD shall be coded "HW".

(b) Blocks W and X of the DTID must identify:

1. That the container is "empty.

2. Layman description of the container; such as 55-gallon metal drum.

3. NSN or LSN/FSC and noun name of the previous contents.

(8) For acutely hazardous containers the following shall apply:

(a) Block C of the DTID shall be coded "HW" and the turn in shall be manifested to the *DRMO* unless transported onsite.

(b) Blocks W and X of the DTID must identify:

1. That the container holds "residue" only.

2. Layman description of the container; such as 55-gallon metal drum.

3. NSN or LSN/FSC and noun name of the previous contents.

g. Shipping and Storage Containers, FSC 8145. When these containers are turned in to the DRMO, the generating activity shall furnish a signed certificate on the DTID, substantially stating the following: "I certify that the container(s) listed hereon are empty."

23. Contractor Inventory.

a. When contractor inventory property is physically transferred to DRMO custody, it shall lose its identity as contractor inventory materiel and procedures contained in this manual for excess/surplus material shall apply.

b. Contractor inventory materiel that remains in the custody of and on the site of the contractor facility may be referred

to a DRMR for sale assistance. The document referring the property for sale must contain the contract number and name of contractor. The proceeds from sale of this property shall be deposited to the General Fund Receipt Account 97R2651 (see Chapter XIV, Sales, paragraph K15).

c. Where only service contract disposal assistance is available for the disposition of DoD-owned hazardous property, the document is referring the property for disposal must reflect the contract number under which the material was acquired, location of the property, the name of the contractor, and fund cite for billing service contract costs.

d. For hazardous contractor inventory, Plant Clearance Officers (PLCOs) may request *DRMS* assistance, on a reimbursable basis only, in the disposal of hazardous property which is the disposal responsibility of the contractor under the contract. With *DRMS* consent, and host concurrence, haz-

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Appendix H

CHAPTER XIV

SALES

A. GENERAL. This chapter provides DoD policy in sales planning, merchandising, contracting, and in releasing surplus, foreign excess, and other categories of property authorized for sale in the DoD Personal Property *Reutilization* and *Marketing* Program.

B. PREPARATION FOR SALE.

1. Authorized sale methods are:

a. Sealed Bid — used for one-time, term, or minimum-maximum competitive type sales.

b. Spot Bid — used for one-time competitive type sales.

c. Auction — used for one-time competitive type sales.

d. Negotiated — used for one-time, term, or minimum-maximum competitive type sales.

e. Retail — used for cash and carry type sales.

2. All persons or organizations, other than those specifically listed below, shall be entitled to purchase property offered by DoD selling activities. Requests on how to buy surplus property shall be referred to *DoD Bidders Control Office, Defense Reutilization and Marketing Service, P.O. Box 1370, Battle Creek, MI 49016-1370.*

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a. Competitive Bid Sales:

(1) Auctioneers and others under contract for the purpose of conducting a specific sale, their agents or employees, and immediate members of their households.

(2) Military and civilian personnel of the DoD and military and civilian personnel of the U.S. Coast Guard whose duties include any functional or supervisory responsibilities for or within the DoD Personal Property *Reutilization* and *Marketing* Program, their agents, employees, and immediate members of their households.

(3) Any persons or organizations intending direct or indirect shipment of foreign excess property located in overseas areas (exclusive of Alaska, Hawaii, Puerto Rico, American Samoa, Guam, TTPI, and the Virgin Islands) to those countries or geographical areas mentioned in *Chapter XVI, Sale, Abandonment, or Destruction of Foreign Excess Personal Property.*

(4) Persons under 18 years of age.

(5) Individuals or firms who are ineligible as purchasers due to suspension or debarment procedures.

b. Retail Sales. Paragraph G, this chapter, contains guidance on participation of personnel in retail sales.

NOTE: See *Chapter VIII, Property Requiring Special Processing,* for instructions *pertaining* to restrictions on the sale of certain commodities requiring special handling.

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3. Sales Planning.

a. Sales planning is an extremely important element of the sales program and requires the cooperative action of the *DRMR* and the *DRMO* to result in a monetary return most beneficial to the Government. The *DRMR* has the primary role in obtaining satisfactory sale results, including selection of the most appropriate sale method, catalog layout and advertising. The *DRMR* is also responsible for coordination with the *DRMO* on the adequacy of lotting, item description, and the development of improved sale techniques. No one method or sale shall be used to the exclusion of other sale methods in the absence of extenuating circumstances.

b. Small quantities of property of estimated low dollar value sale return or property in poor condition shall be subjected to the economy formula (see *Chapter XV, Abandonment or Destruction*). If it is determined that there is no reasonable prospect of disposing of the property by sale, by commingling with small quantities of other items in one miscellaneous lot, or by further accumulation within a reasonable period, the property shall be expended to scrap or disposed of in accordance with the provisions of *Chapter XV*.

c. Property shall be lotted and displayed in a manner that will enhance its sale value and result in maximum proceeds at least expense to the U.S. Government.

d. Market Impact Reporting. It is imperative that careful consideration be given to the adverse market impact which may result through the untimely sale of large quantities of certain surplus items.

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(1) Those items meeting the criteria contained in subparagraph B3d(3) below shall be reported for market impact clearance before being offered for sale. The activity having the reporting responsibility as designated in subparagraph B3d(3) shall include the following information in each impact request.

(a) A full description of the property involved including stock number; manufacturer's name and part number, if known; weight, etc.

(b) Location(s) of property.

(c) Quantity.

(d) Unit and total acquisition costs.

(e) Condition code.

(f) Any recommendation as to a proposed method of sale.

(2) All requests for market impact clearances shall be addressed to the U.S. Department of Commerce, Washington, DC 20230.

(3) Designated activities shall report only those commodities located in the United States and meeting the criteria expressed in subparagraphs B3d(3)(a) through B3d(3)(c) for market impact clearance.

(a) *DRMOs* shall report the following:

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1. Any item with a total acquisition cost greater than $500,000 in Federal condition codes A1 and A2 at any one *DRMO.* As used in the preceding sentence, the term "any item" encompasses any commodity having commercial application, regardless of whether the commodity requires centralized screening. The term normally is applicable to property having a specific NSN. However, property having different stock numbers but similar characteristics and usage; such as, shirts or shoes of different sizes, shall be reported, if meeting the condition code requirement and collectively meeting the acquisition cost criterion. *DRMOs* may not, under any circumstances, employ any device or technique; such as dividing property into two or more sale items, to circumvent this reporting requirement.

2. Gasoline cans, 5-gallon size, in quantities of 50,000 each or more in Federal condition codes A1 and A4. Cans meeting the criteria must be located at a single *DRMO* to be reportable for market impact clearance.

3. Machine tools of any one type and at any one location which have a collective acquisition value greater than $500,000 and are in Federal condition codes A1, A4, D1, D4, and D7.

(b) *DRMRs* shall report wooden pallets when the proposed weekly sales volume within the regional geographic area exceeds 1,000 pallets of the same size and the units are in condition codes A1 and A4.

(c) *DRMR* Memphis shall report explosives, including smokeless powder, when proposed dispositions from all sources combined exceed 25 million pounds a fiscal year. This requirement pertains to the collective volume of all types of

explosives combined and applies specifically to that portion of the volume exceeding 25 million pounds a fiscal year.

(4) The DoC shall investigate reported material for possible market impact and shall make disposition recommendations to the reporting activity within 30 days of the request for clearance. In those cases where the DoC does not grant outright approval of disposal action, the reporting activity shall provide all related documentation to *DRMS* and defer further action until receipt of guidance from *DRMS*. When the disposal determination of the DoC is not concurred in, *DRMS* shall refer the matter to DLA-SM for further negotiation and coordination.

(5) *Sale of property by the negotiated method* does not change the requirement for the responsible activity to obtain market impact advice through the DoC.

e. Property reporting and sale schedules shall be developed to ensure expeditious property disposal, maximum competition, maximum sale proceeds, good public relations, and uniform workload.

f. The *DRMRs* shall carefully consider all factors developed during presale planning and determine the best method of sale for property.

g. *DRMRs* shall provide advance notice to the U.S. Department of Commerce, Room 1300, 433 West Van Buren Street, Chicago, IL 60607, of all proposed or scheduled competitive bid sales (except negotiated, local spot bid, and local auction sales) of usable property located in the United States, Puerto Rico, American Samoa, Guam, TTPI, and the Virgin Islands, having a total acquisition cost of $250,000 or more per

sale and sales of scrap and recyclable material with a minimum potential return of $5,000 per sale. *The notice, to be published in the Commerce Business Daily, shall be sent as early as possible in advance of the sale but at least 20 days prior to bid opening date, or, in the case of national spot bid or auction sale, when the sale will be conducted.*

C. SALE SOLICITATIONS.

1. Preparation and distribution of sale solicitations.

a. Sales planning efforts shall culminate in the preparation and distribution of sale solicitations by the supporting *DRMRs.*

b. Sale solicitations should be prepared in a manner that would provide the prospective purchasers with general information, instructions, general sale terms and conditions, special conditions, and an accurate, complete description of the property being offered for sale.

c. Sale solicitations shall be given adequate public notice and shall be distributed in sufficient time to be received by prospective purchasers before the first day of the inspection period.

d. *DRMS* shall maintain consolidated lists of prospective purchasers for control and distribution of sale solicitations. Activities should forward all requests for inclusion on the list to *DRMS* for action. This listing shall be maintained by classes of property and geographical areas to permit selection of prospective purchasers both by commodity desired and geographic location in which the purchaser has stated an interest in buying.

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2. Sale Terms and Conditions. General sale terms and conditions and special conditions applicable to the type of sale, commodity being sold, or work to be performed shall be used in the sale of all surplus, foreign excess, or other category of property offered for sale by DoD selling activities. If appreciable work (any restoration, construction, alteration, or repair which is estimated exceed $2,000) must be performed in conjunction with the removal of sold property the special conditions listed below shall be used when applicable. To the extent that any sale solicitations may offer property for sale under conditions which may require appreciable restoration, construction, alteration, or repair (including painting and decorating) of public buildings or lands, the provisions of *DoD FAR Supplement Part 22.4* shall be applicable, and conditions required by the FAR shall be included in the sale solicitations. Conditions in subparagraphs C2a through C2c below shall be as stated in *DoD FAR Supplement Part 22.*

a. Convict labor. This condition is not applicable to foreign excess property unless required by U.S./Host government agreements.

b. Contract Work Hours Standards Act — Overtime Compensation.

c. Equal Opportunity. This condition shall be used only when the anticipated contract price would exceed $10,000 and an appreciable amount of work is involved (exclusive of normal pickup and delivery of the property, packing, and loading).

3. Sale Promotion. Property offered for sale shall be brought to the attention of the buying public by various means and media and by both free publicity and paid advertising. Every effort shall

be made to obtain maximum free publicity. The amount of paid advertising shall be commensurate with the type and value of property being sold.

4. Foreign Liaison.

a. Visits. By authority of the Commander of a DoD activity, foreign nationals and representatives of friendly foreign governments or international organizations may be admitted to the *DRMO* or *DRMR* for the purpose of inspecting items of excess (for FMS), surplus, or FEPP available for sale, or obtaining information relative to such sales, if no classified information is disclosed. (See definitions in Chapter III for Denied Areas, Friendly Foreign Governments, International Organizations, and Nonexempted Overseas Areas.)

b. Release of Unclassified Information.

(1) Release to representatives or nationals of denied areas. All written requests for information from foreign nationals or representatives of denied areas shall be referred to HQ DLA, ATTN: *DLA-I*.

(2) Release to representatives of friendly foreign governments or international organizations. Unclassified information which is normally furnished to the general public may be released by any DoD field activity directly to representatives of friendly foreign governments or international organizations when such information is requested.

(3) Release to Nationals of Friendly Foreign Governments or International Organizations.

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(a) Unclassified information relating to the sale of surplus or FEPP which is normally furnished to the general public may be released by any DoD field activity directly to individuals or business concerns in friendly foreign countries (or representatives in the United States of such foreign business concerns) to facilitate the sale of surplus or FEPP to those individuals, concerns, or representatives.

(b) In all other cases of correspondence from individuals or business concerns in friendly foreign countries (or representatives in the United States of such foreign business concerns), the information requested will be assembled and forwarded to HQ DLA, ATTN: *DLA-I,* for reply.

D. WITHDRAWAL FROM SALE.

1. General. Property which has survived screening and has become eligible for sale may be requested to satisfy valid requirements within limitations specified in this paragraph. Withdrawal requests for the purpose of donation shall be processed in accordance with *Chapter XIII, Donations.* As a general policy, property once advertised for sale may not be withdrawn (see DoD Directive 4160.21). However, circumstances may require the withdrawal of property from sale to satisfy valid needs within the DoD or Federal civil agencies. Every effort shall be made to keep such withdrawals to a minimum. These efforts shall include searching for assets available elsewhere in the disposal process. Exceptions to this policy shall be implemented only when all efforts to otherwise satisfy a valid need have been exhausted and the withdrawal action is determined to be cost effective and in the best interest of the Government.

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2. Requests for withdrawal of property. Requests shall be made to the *DRMO* by the most expeditious means. With the exception of IMM/ICP and NMCS requisitions, requests shall provide full justification to include a statement that the property is needed to satisfy a valid requirement. The requisition or an approved transfer request may accompany the request for withdrawal, but in any event must be submitted within 10 working days following the date of request. Withdrawals may not be processed subject to property inspection for acceptability. If inspection is required, it shall be accomplished before requesting withdrawal. Justification statements are not required on requisitions submitted by ICPs/IMMs before award. Once an item is printed in a sale solicitation, DoD activities, with the above exception, and Federal civil agencies must support their withdrawal request with the following minimum factual information:

a. Detailed justification as to why the property is required, to include the use which shall be made of the property if withdrawn from sale; *such as, applicability of material to active weapons systems.*

b. Mission impact statement from a support, procurement, and funding standpoint, if property is not withdrawn from sale; such as, *effect on operational readiness requirements within a specified period of time.*

c. Effort made to meet requirement from other sources to include consideration of use of substitute items.

3. Approvals. Authority to approve withdrawals advances to higher management levels as property moves through the sale cycle, accordingly, more severe constraints are progressively imposed as specified in the following subparagraphs:

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a. The *DRMO Chief* is authorized to approve requests for the period between ESD and the date the property is referred to the *DRMR* for sale cataloging.

b. The *DRMR Marketing Chief* is authorized to approve withdrawal requests *from date of referral until the property is awarded.*

c. DLA-S approval, *with DLA-G concurrence,* is required on any request after the award but before removal.

4. *Property retrieval ofter sale. After award and removal, the requesting organization must negotiate with the purchaser ibr "turn of the item. The SCO shall provide contract information when requested.*

E. SALES CONTRACTING.

1. Contracts for the sale of Government property shall be entered into and administered under the provisions of the Federal Property and Administrative Services Act of 1949, as amended, other applicable statutes, and regulations issued by GSA, DoD, DLA, and *DRMS.*

2. SCOs shall utilize a maximum of safeguards and controls in the conduct of all sales. Specific SCO responsibilities shall be issued by *DRMS.*

3. All documentation pertaining to contracts which require signature shall be signed for the U.S. Government by the SCO under the title of "Sales Contracting Officer."

4. Sales requiring approval after offering and before award.

a. SCOs may make awards of contracts on sales of usable property having an acquisition cost (estimated if unknown) of less than $100,000. Except for antitrust advice limitations, awards of scrap property do not require approval by higher authority.

b. The *DRMR Marketing Chief is authorized to approve contract awards on* the sale of usable property having an acquisition cost of $100,000 or more.

c. DRMS is authorized to approve negotiated sales with an estimated fair market value of $15,000 or less.

d. Negotiated sale contracts with an estimated fair market value in excess of $15,000 shall be referred to the Administrator of General Services for approval (paragraph F5, this chapter).

e. Antitrust advice shall be obtained, *through local counsel,* from the Attorney General before award of a contract when the property, usable or scrap, has an acquisition cost of $3,000,000 or more, under Section 207 of the Federal Property and Administrative Services Act of 1949, as amended. *Simultaneously, the Administrator of General Services shall be apprised of the antitrust advice request.*

5. Sales Contracts, Awards, and Contract Administration.

a. The following types of sales contracts are authorized for use in the sale of surplus, foreign excess, and other categories

of property sold in the DoD Personal Property *Reutilization* and *Marketing* Program:

(1) A one-time contract which is used when a sale is made in one transaction (actual deliveries may comprise several release transactions).

(2) A term contract which is limited to the disposal of property generated over a period of time, and in quantities which ran be reasonably estimated for a specific period of time, or offered with minimum-maximum quantity provisions.

b. Procedures for the receipt, acceptance, and processing of bids for the various methods of authorized sales shall be prescribed by *DRMS.*

c. Awards normally shall be made to the highest responsible and responsive bidder. Exceptions to this policy and definitions regarding a responsible/responsive bidder shall be as determined by *DRMS.*

d. Distribution of sales contracts shall be prescribed by *DRMS.*

F. NEGOTIATED SALES.

1. Conditions under which the SCO may negotiate sales of surplus property are set forth below.

2. Criteria for Negotiated Sales of Surplus Property (see *Chapter XVI, Sale, Abandonment, or Destruction of Foreign Excess Personal Property,* for negotiated sales of FEPP). The

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following are the only conditions under which negotiated sales of property may be conducted. Property may be sold by this method subject to obtaining such competition as is feasible under the circumstances when:

a. Property has an estimated fair market value not in excess of *$15,000* and the sale is considered by the authorized DRMR to be in the best interest of the U.S. Government. Large quantities of material may not be divided nor disposed of through multiple sales to avoid the requirements of formal advertising.

b. Public exigency may not admit delay incident to advertising. This includes disposals of perishable food or other property which may spoil or deteriorate so rapidly as to require that dispositions or disposals be made immediately for the preservation of human life or the alleviation of human suffering.

c. Bid prices received after advertising are not reasonable (either as to all or a portion of the property) or bid prices have not been independently arrived at in open competition and it is determined that readvertising shall serve no useful purpose. Under this condition, all responsible bidders who responded to the previous advertising shall be accorded an opportunity to submit offers for the property.

d. Disposal shall be to a State, Territory, possession, political subdivision thereof, or tax-supported agency therein, and the estimated fair market value of the property and other satisfactory terms of disposal are obtained by negotiation.

e. Public health, safety, or national security shall be promoted; such as when the property is a hazard to health or other property as to require immediate disposition.

f. Disposal is necessary in the public interest during the period of a national emergency declared by the President or the Congress. The authority of this paragraph shall be used only with respect to:

(1) Particular items of personal property identified by the Administrator of General Services.

(2) Specifically described category or categories of property determined by the Administrator of General Services during any period fixed by the Administrator but not in excess of 3 months. (NOTE: Declaration of a national emergency alone is not justification for use of this authority. There must be other reasons for making use of negotiation necessary in the public interest.)

g. Property involved is of a nature which, if disposed of by other methods of sale, would cause such an impact on an industry or industries as to adversely affect the national economy, and the estimated fair market value of such property and other satisfactory terms of disposal can be obtained by negotiation. This procedure in no way changes the routine requirement for *DRMRS* in the United States, Puerto Rico, American Samoa, Guam, TTPI, and the Virgin Islands to obtain market impact advice from the DoC. The authority contained here is applicable only in those cases in which DoC advises *DRMS* that a particular competitive sale may create an adverse market impact situation, recommends that the sale be effected by negotiation as the only solution, and the recommendation is concurred in by *DRMS*. Use of this authority requires the submission of full and adequate justification to the Administrator of General Services for approval before entering into negotiations.

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3. SCOs are authorized to enter into negotiations for the sale of surplus property under the criteria set forth in subparagraph F2a, if a determination is made by the SCO that a negotiated sale of the property would be in the best interest of the Government.

4. When it is determined that the negotiated sale of surplus property under conditions of subparagraphs F2b through F2g above would be in the best interest of the Government and the property involved has a market value in excess of *$15,000*, the detailed information required by subparagraph F5 below must be submitted for *Congressional* approval before award of any sales contract.

5. For each proposed negotiated sale of surplus property having a market value in excess of *$15,000*, irrespective of the authority being used (subparagraphs F2b through F2g), the SCO shall prepare an explanatory statement of the circumstances of the sale by negotiation. The statement shall be transmitted as an enclosure to the transmittal letter to *DRMS*, in advance of each such sale. *DRMS* shall review the proposed sale and forward the request in 10 copies to the Administrator of General Services for review and transmittal to the appropriate committees of the Senate and the House of Representatives. GSA shall furnish *DRMS* a copy of its letter of transmittal to Congress. Thirty-five days from the date on the GSA letter of transmittal and in the absence of any objections by the Congress, sale may be consummated without further referral or actions by GSA. The explanatory statement shall include all of the items as may be applicable, as prescribed by *DRMS*.

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6. Negotiated Sales of Vessels.

a. The Director of *Marketing, DRMS,* is the designee of the Secretary of the Navy to approve the negotiated sales of vessels of the Navy (battleships, cruisers, aircraft carriers, destroyers, and submarines) stricken from the Naval Register under 10 U.S.C. 7304 carried out in provisions of Executive Order 11765, 21 January 1974.

b. If the Director of *Marketing* determines that the vessel(s) may be sold by negotiation, the SCO shall proceed with negotiations. When the negotiations are completed, the SCO shall forward a copy of the proposed negotiated contract to the Director of *Marketing* for approval before award.

7. Reporting Requirements.

a. With the submission of RCS: DD-P&L(Q)496, Report of Excess and Surplus Materiel at Disposal Activities, DRMS shall attach a listing and description of negotiated sales of surplus property which resulted in sale proceeds between $5,000 and $15,000.

b. This listing shall include negotiated sales completed within the fiscal year and shall be forwarded annually with the fourth quarter submission of the report.

G. RETAIL SALES. Retail sales of surplus, foreign excess, and abandoned privately-owned property may be conducted at *DRMOs* whenever such a program can effectively and economically be used to supplement other methods of sale. The *DRMO* implementation of a retail sale program shall be determined on a case-by-case basis by *DRMS,* however, this authority may

be further delegated to the *DRMRs*. The following guidance pertains to the sale of property using the retail sale method:

1. All items shall undergo screening, as appropriate, before being offered for retail sale.

2. All property received as items, if offered for sale by retail, shall be sold as items and not by weight or lot. An exception to this policy is granted for scrap authorized for retail sale (see subparagraph G4 below).

3. Limitations of retail sales.

a. In the United States, Puerto Rico, American Samoa, Guam, TTPI, and the Virgin Islands.

(1) Unit acquisition cost (actual or estimated) *for FSCs listed in DRMS internal procedures may not exceed $500. Exceptions to this policy are for FSCs 3510, 4110, 6515, 6540, 7105, 7110, 7125, 7195, 7310, and 7730. For these FSCs the unit acquisition cost (actual or estimated) of individual items sold may not exceed $1.000.* Property sold to one buyer on any one day may not exceed $1,000 total selling price.

(2) The retail selling price of property may not be set below the price it would bring by competitive bid.

b. Overseas areas, excluding Puerto Rico, American Samoa, Guam, TTPI, and the Virgin Islands (see *Chapter XVI, Sale, Abandonment, or Destruction of Foreign Excess Personal Property*).

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4. Scrap may not be sold by the retail sale method except as authorized by *DRMS*. These authorizations shall be limited to specific situations and types of property for which deviation can be fully justified. Authorizations shall be in writing, and shall specify the quantities and types of property and time period covered.

5. Retail sales of lost, abandoned, or unclaimed privately-owned personal property may be conducted without regard to the limitations concerning acquisition cost cited in subparagraph G3a(l).

6. Retail sales shall be conducted on a cash, no refund, first-come-first-served, as is where is, basis.

7. Retail sales shall be open to the public and to all U.S. Government personnel, except *the following DoD and U.S. Coast Guard personnel may not participate in retail sales:*

a. A civilian employee of the DoD or the U.S. Coast Guard whose duties at the installation where the property is sold include any functional or supervisory responsibility for or within the DoD Personal Property Reutilizalion and Marketing Program.

b. A member of the Armed Forces of the United States, including the U.S. Coast Guard, whose duties at the installation where the property is being sold include any functional or supervisory responsibility for or within the DoD Personal Property Reutilizalion and Marketing Program.

c. An agent, employee, or immediate member of the household of personnel in subparagraphs G7a and G7b.

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H. DISSEMINATION OF AWARDS INFORMATION. *DRMRs* shall prepare lists of successful bidders (normally within 10 workdays after each bid opening), except for local spot bid, local auction, and negotiated sale contracts. Distribution of lists of successful bidders shall be made as follows:

1. One copy to each bidder who submitted a bid in response to the sale solicitation and any other interested parties on request.

2. One copy to each applicable *DRMO.*

3. Three copies to *DRMS.*

4. One copy to Small Business Administration Property Sales Representatives, except FEPP sales.

5. One copy to HQ DLA, ATTN: DLA-SMP. Cameron Station, Alexandria, VA *22304-6100.*

6. On FEPP sales, one copy to the Bureau of Alcohol, Tobacco, and Firearms, Washington, DC 20226.

I. CONTRACT ADMINISTRATION FILES. Contract administration files shall consist of a sale solicitation folder, financial folder, individual contract folder(s), and an unsuccessful bids folder for each sale. *DRMS* shall develop procedures for maintaining, completing, reviewing, and auditing these files.

J. COLLECTION AND DISTRIBUTION OF PROCEEDS.

1. A Financial Record, *DRMS* Form 1578, covering all sales shall be maintained by appointed cashiers of the *DRMRs* and *DRMOs.*

2. All sale proceeds shall be received, recorded, processed, and accounted for by the cashier(s).

3. Forms of deposits and payments and collection procedures shall be *issued by the Deputy Assistant Secretary of Defense (Comptroller) and DLA-C.*

K. DEPOSITING OF PROCEEDS.

1. General. All proceeds received by a cashier shall be turned over to the servicing A&FO on a DD Form 1131, Cash Collection Voucher, for ultimate deposit to the proper account cited *on the DTID and identified in subparagraphs K2 through K17* below.

2. General Fund Receipt Account 97R2651. Except as covered in the following *subparagraphs K3 through K17,* proceeds received from the sale of DoD surplus and foreign excess personal property *and monies collected incident to such sales* shall be deposited directly to the General Fund Receipt Account 97R2651. This includes charges for storage, loading, or wharfage fees when the property is stored at DoD installations, *deposits forfeited on storage aids, etc.* Where the property sold is stored at a non-DoD installation, fees received for storage, loading, and wharfage shall be deposited to the same appropriation account to which sale proceeds are assigned. Proceeds, including bid deposits for term sales not deposited directly to the General Fund Receipt Account 97R2651, shall be deposited to supporting Military Department A&FO Suspense Account X6875 as follows:

17X6875 — Navy and Marine Corps
21X6875 — Army
57X6875 — Air Force

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3. Industrial Fund Property.

a. Proceeds (100 percent) from the sale of scrap turned in to the DRMO by IF activities shall be deposited to the account of the generating IF activity.

b. Proceeds (100 percent) from the sale of usable personal property purchased by and turned in by IF activities shall be deposited to the account of the generating IF activity.

4. Bones, Fats, and Meat Trimmings. Proceeds (100 percent) from the sale of bones, fats, and meat trimmings generated by a commissary store shall be deposited to the pertinent Departmental Stock Fund Commissary Store Activity Account.

5. Other Edible Wastes. Proceeds (100 percent) from the sale of other edible wastes generated by commissary stores shall be deposited to the General Fund Receipt Account 97R2651.

6. Military Assistance Program and MAP Funded Military Assistance Advisory Group Administrative Property.

a. Proceeds (100 percent) from the sale of property originally issued under MAP, which has been returned by a foreign country or international organization as no longer needed for the purpose for which issued, shall be deposited to the current Military Assistance, Funds Appropriated to the President Account 11*1080. (*Denotes current fiscal year.)

b. Proceeds (100 percent) from the sale of MAP funded MAAG administrative property, including vehicles, shall be deposited to Military Assistance, Funds Appropriated to the President Account 11*1080. (*Denotes current fiscal year.)

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7. Property Owned by Nonappropriated Fund Instrumentalities.

a. Proceeds (100 percent) from the sale of property disposed of for activities financed under nonappropriated funds, including post exchange property, shall be deposited to the supporting A&FO Suspense Account X6875. (17X6875, Navy and Marine Corps; 21X6875, Army; and 57X6875, Air Force.)

b. Upon completion of the sale transaction, a check shall be drawn on the Suspense Account and forwarded to the applicable instrumentality.

c. Proceeds (100 percent) from the sale of garbage suitable for animal consumption that is disposed of under a multiple pickup contract shall be deposited to the General Fund Receipt Account 97R2651. Proceeds may not be prorated for return to individual nonappropriated fund activities included in the multiple pickup contract.

8. U.S. Coast Guard Property.

a. Proceeds (100 percent) from the sale of USCG property under the physical control of the USCG at the time of sale shall be deposited to the supporting A&FO Budget Clearing Account F3875. (17F3875, Navy and Marine Corps; 21F3875, Army; and 57F3875, Air Force.)

b. Upon completion of the sale transaction, a check shall be drawn on the suspense account and forwarded to the USCG at the following address:

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Commandant
U.S. Coast Guard (CFAC)
Washington, DC 20593-0001

c. Proceeds (100 percent) from the sale of USCG property physically turned in to a *DRMO* shall be deposited to the General Fund Receipt Account 97R2651.

d. Proceeds (100 percent) from the sale of USCG aircraft located at the AMARC shall be deposited to the General Fund Receipt Account 97R2651. (USCG aircraft located at AMARC which are released for reclamation and disposal shall be processed in the same manner as Air Force property.)

9. GSA-Owned Automatic Data Processing Equipment.

a. Proceeds (100 percent) from the sale of ADPE owned by GSA and leased to DoD shall be deposited to the supporting A&FO Budget Clearing Account (Suspense) F3875. (17F3875, Navy and Marine Corps: 21F3875. Army; and 57F3875, Air Force.)

b. Upon completion of the sale transaction, a check shall be drawn on the suspense account and forwarded to GSA at the following address:

General Services Administration
Office of Finance (WBCRC)
Collections and Securities
Seventh and I Streets NW. Washington, DC 20407

10. Foreign Equity Property. Proceeds from the sale of property owned by a foreign country or international organization shall be deposited as follows:

a. Twenty percent shall be deposited to the current year operation and maintenance appropriation account of the DoD component which sells the property. The account to be credited for *DRMS* sales is 97*0100.5141. (*Denotes current fiscal year.)

b. Eighty percent shall be deposited to the supporting A&FO Suspense Account X6875. (17X6875, Navy and Marine Corps; 21X6875. Army; 57X6875, Air Force.)

c. Upon completion of the sale transaction, a check for 80 percent of the sale price shall be drawn on the suspense account and forwarded to the applicable foreign country or international organization.

11. Recyclable Material. Proceeds (100 percent) from the sale of recyclable material generated by participating activities governed by DoD Directive 4165.60. Solid Waste Management-Collection, Disposal, Resource Recovery and Recycling Program, implementing the provisions of 10 U.S.C. 2577 shall be deposited to the Budget Clearing Account (Suspense) F3875 of the A&FO identified on the DTID (17F3875, Navy and Marine Corps; 21F3875. Army; 57F3875, Air Force). *Reimbursement may not be made for property for which the DTID does not contain the appropriate Suspense Account (F3875) designated for this program, or for an amount less than $25.00 for a sale item.*

12. Timber and Related Forest Products. Proceeds (100 percent) from the sale of timber and related forest products shall be deposited to the Budget Clearing Account (Suspense) F3875 of the A&FO identified on the DTID. (17F3875, Navy and Marine Corps; 21F3875, Army; and 57F3875, Air Force.)

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13. Trust Fund Property. Proceeds (100 percent) from the sale of property purchased with funds from Trust Fund Account "Surcharge Collections. Sales of Commissary Stores" shall be deposited to the supporting Departmental Trust Fund Account X8420. (17X8420, Navy and Marine Corps; 21X8420, Army; and 57X8420, Air Force.)

14. Lost, Abandoned, or Unclaimed Privately Owned Personal Property.

a. Twenty percent of the proceeds from the sale of lost, abandoned, or unclaimed privately owned personal property shall be deposited to the General Fund Receipt Account 97F2651.

b. Eighty percent of the proceeds shall be deposited to the owning Service's Account X6001, Proceeds of Sales of Lost, Abandoned, or Unclaimed Personal Property. (17X6001. Navy and Marine Corps; 21X6001, Army; and 57X600l. Air Force.)

c. The owner(s) of lost, abandoned, or unclaimed property may claim 80 percent of the proceeds from the sale of that property within 5 years of the date of the sale by providing proof of ownership to the U.S. Government. After 5 years from the date of sale, any unclaimed net proceeds shall be transferred from __ X6001 to the General Fund Miscellaneous Receipt Account R1060, Forfeitures of Unclaimed Money and Property.

15. All Other Property (Includes Government Furnished Material/Equipment in the Possession of Contractors). Proceeds (100 percent) from the sale of contractor inventory and all other property not otherwise identified above shall be deposited to the General Fund Receipt Account 97R2651.

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16. Liquidated Damages. Liquidated damages received as a result of contractor default actions shall be deposited to the General Fund Receipt Account R1099. (17R1099, Navy and Marine Corps; 21R1099, Army; and 57R1099, Air Force.)

17. Interest. Interest received as a result of contractor indebtedness shall be deposited to the General Fund Receipt Account *R3210.* (17R*3210.* Navy and Marine Corps: 21R*3210.* Army, and 57P3210. Air Force.)

L. DELAY IN PAYMENT OR REMOVAL OF PROPERTY.

1. Storage charges shall be assessed when the purchaser fails to pay for and remove all the property awarded within the removal period specified in the sale solicitation and sale contract. Such charges may not be assessed when an extension of time is requested by the purchaser and approved in writing by the SCO under provisions of the contract.

2. If the contract is terminated for failure to pay for or remove property, liquidated damages shall be assessed instead of and in full settlement of any accrued storage charges or other costs.

3. Assessed storage charges shall be paid before the removal of property unless otherwise authorized.

M. DEFAULTS, MISTAKES IN BIDS, DISPUTES AND APPEALS, CLAIMS, AND PROTESTS AGAINST AWARDS. SCOs shall process all defaults, mistakes in bids, disputes, appeals, claims, and protests in accordance with procedures issued by DRMS.

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N. SALE RELEASES.

1. All personal property sold shall be inspected by *DRMO personnel or* representative at the time delivery or shipment is made to purchasers, in order to prevent error, fraud, or theft. *Base commanders shall provide, by letter designation and upon request from the DRMO, the names, telephone numbers and titles* of *those non-DRMO personnel authorized to release property located at their activities. Annually, in January or as changes occur, additions, deletions, and revisions of such representation shall be provided in writing to the DRMO.*

2. Property sold by weight shall be weighed at the time or delivery to the purchaser. Property sold by unit shall be counted or measured at the time of delivery.

3. Weighing or Sale Deliveries.

a. *DRMO* Scales. Platform, truck, and railroad scales located at or under the jurisdiction of a *DRMO,* which are used to weigh property being delivered on sales contracts.

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DEFENSE REUTILIZATION AND MARKETING SERVICE

BATTLE CREEK, MICHIGAN

PROPERTY DISPOSAL PROCEDURES FOR THE DEFENSE REUTILIZATION AND MARKETING OFFICES

MAR 92

STANDARD OPERATING PROCEDURE FOR PRE-RECEIVING AT THE DRMO

PROCEDURE	Encl 1, Chap II
Receiving	DRMS-M 4160.14

References:

a. DRMS-H 4160.3, Volume II, Chapter II, Paragraph D5d:2).

b. DRMS-M 6050.1.

The following tasks will be performed by the Property Management Branch/Section:

1 Schedule delivery of property with the generating activities. See Chapter I, enclosure 1, for sample letter to generating activities. Prereceiving procedures for hazardous property can be found at enclosure 2.

2 Review the DTIDs and check property for acceptability. See Chapter I, enclosure 1, attachments 3 and 5 for property that cannot be accepted by the DRMO.

3 Verify that the property being turned in is a DRMS disposal responsibility. See Chapter I, enclosure 1, attachment 3 for a listing of the property which is not a DRMS responsibility.

NOTE: The DRMO environmental/specialist monitor will resolve environmental problems (see enclosure 2).

4 Spotcheck DTID for required information to include DEMIL code or clear-text statement of DEMIL, inert and declassification certificates, as required.

NOTES:

a. After the DTID has been checked for the required information, it will be matched against the property being turned in. If there are discrepancies, annotate on the DTID. If it is unwarranted, the turn-in will be refused. This includes rejection of turn-ins which do not contain a valid Disposal Authority code (rp 64) of M, N, or R on the DTID.

b. When it is obvious the quantity, item identification, condition or price are incorrect, the DRMO will seek resolution of the discrepancy with the generator. If the generator changes the data, the DTID will be annotated by the generator's representative. Where it is impractical for the generator to send someone to change the DTID and the generator agrees that a change is

authorized, a DRMO receiver/supervisor will make the appropriate annotation (including who authorized the change, date and initials of DRMO employee). When the generating activity refuses to either change the document or authorize a change to be made by the DRMO, the property will be returned to the generator using a DRMS form 917.

5 If property or DTID is determined to be unacceptable:

a. Prepare two copies of DRMS Form 917 for all property refused. Show the reason for refusal by checking the appropriate block or making a comment in the remarks block.

(2)

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SUPREME COURT, U.S.

No. 97-2080

In the Supreme Court of the United States

OCTOBER TERM, 1997

J & E SALVAGE COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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10 pp

QUESTION PRESENTED

Whether the government's refusal to return helicopter transmissions that were inside containers that petitioners purchased at auction as surplus property constitutes a taking under the Just Compensation Clause of the Fifth Amendment, where the transmissions came into the government's possession pursuant to court order.

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In the Supreme Court of the United States

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J & E SALVAGE COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is not yet reported. The opinion of the Court of Federal Claims denying petitioners' Fifth Amendment claim (Pet. App. 17a-25a) is reported at 36 Fed. Cl. 192, and its order denying reconsideration (Pet. App. 26a-29a) is unreported. The opinion of the Court of Federal Claims dismissing petitioners' contract claim for lack of jurisdiction (which is not reproduced in the petition's appendix) is reported at 37 Fed. Cl. 256. The related decision of the United States District Court for the Eastern District of North Carolina is unreported. *United States* v. *J & E Salvage Co.*, No. 92-162-Civ-4-H (Aug. 19, 1994). The opinion of the United States Court

of Appeals for the Fourth Circuit on appeal of that decision (Pet. App. E) is reported at 55 F.3d 985.

JURISDICTION

The court of appeals entered its judgment on March 25, 1998. The petition for a writ of certiorari was filed on June 23, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 484 of Title 40 of the United States Code governs the disposition of surplus governmental property. Subsection (d) of that Section provides:

> A deed, bill of sale, lease, or other instrument executed by or on behalf of any executive agency purporting to transfer title or any other interest in surplus property under this subchapter shall be conclusive evidence of compliance with the provisions of this subchapter insofar as concerns title or other interest of any bona fide grantee or transferee for value and without notice of lack of such compliance.

40 U.S.C. 484(d).

2. The Defense Reutilization and Marketing Office in the Department of Defense held an auction at the Marine Corps Air Station at Cherry Point, North Carolina, to sell surplus property. The property was sold by lots. Petitioners, a salvage company and its partners, purchased several lots, including those described in the Invitation for Bids and Notice of Award as: "Shipping & Storage Container: 2 EA." Pet. App. 2a. The containers were bolted shut at the time of the sale, so petitioners were unaware that anything was

inside them. Petitioners paid a total of $1,075 for the containers. *Ibid.*

After the auction, petitioners discovered that four of the containers held helicopter transmissions, which had a total value of more than $1,150,000. When petitioners notified the Defense Reutilization and Marketing Office of their discovery, the Office advised petitioners that the transmissions were the property of the government and demanded their return. Petitioners refused. Pet. App. 2a.

3. The government filed suit in the United States District Court for the Eastern District of North Carolina against petitioners for wrongful conversion and replevin. The district court ordered petitioners to return the transmissions to the government. Pet. App. 2a; *United States* v. *J & E Salvage Co.*, No. 92-162-Civ-4-H, slip op. at 2-5 (E.D.N.C. Aug. 19, 1994). Rather than seek a stay, petitioners complied with that order. Pet. App. 3a. In conjunction with their return of the property, petitioners entered into a limited settlement agreement with the government. C.A. App. A95-A99. Under that agreement, petitioners agreed to exchange the containers housing the transmissions for empty containers. Petitioners agreed that "title to the containers in which the transmissions are located will transfer to the United States upon their physical transfer." C.A. App. A96. Only if a court "subsequently determined that the transmissions are in fact the [petitioners'] property" would the petitioners "have the right to exchange empty containers for the containers containing the transmissions." C.A. App.

A97.[1] Pursuant to the agreement, petitioners returned the containers with the transmissions to the government on September 9, 1994. Pet. 3.

Petitioners appealed, and the Court of Appeals for the Fourth Circuit ruled that the dispute between petitioners and the government was contractual in nature, so that the Contract Disputes Act, 41 U.S.C. 601-613, deprived the district court of jurisdiction. Pet. App. 30a-40a.

Petitioners then demanded return of the transmissions from the government. Pet. App. 3a. The government declined on the ground that the transmissions had not been conveyed to petitioners by the sale of the containers, and thus remained the property of the United States. *Ibid.*[2]

4. Petitioners brought this suit in the Court of Federal Claims seeking compensation for the transmissions on the ground that the government's refusal to return them constituted a taking of property without just compensation under the Fifth Amendment. Pet. App. 3a. The Court of Federal Claims held that petitioners had not stated a claim under the Just Compensation Clause because their allegations gave rise to a breach-of-contract, not just compensation, claim. *Id.* at 21a-23a. The court also held that, in "a contest between two parties over conflicting claims of ownership * * * it is axiomatic that there is not [a] taking" where the government takes possession "pursuant to a court

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[1] By contrast, the agreement provided that the financial provisions of the settlement would be nullified if the district court's order was reversed on appeal for any reason. C.A. App. A98.

[2] Because the court of appeals did not decide that title vested in petitioners, the reversal of the district court did not entitle petitioners to recover the containers with the transmissions pursuant to the settlement agreement. C.A. App. A97.

order." *Id.* at 23a.[3] Petitioners then amended their complaint to state a breach-of-contract claim. *Id.* at 4a. The Court of Federal Claims subsequently dismissed that claim for lack of jurisdiction, because petitioners had not submitted a valid claim to the contracting officer, as required by the Contract Disputes Act, 41 U.S.C. 605(a). Pet. App. 4a; see 37 Fed. Cl. 256, 260-263. Alternatively, the court held that petitioners' breach-of-contract claim lacked merit. Pet. App. 4a; see 37 Fed. Cl. at 263-266.

5. The court of appeals affirmed. Pet. App. 1a-15a. The court held that petitioners had "never acquired a compensable property interest" in the transmissions necessary to support a Fifth Amendment just compensation claim because "the transmissions were never part of the subject matter of the contract" between the parties. *Id.* at 5a. The court noted that the description of the items for sale in both the Invitation for Bids and the Notice of Award "clearly and unambiguously referred only to the containers and not to their contents." *Id.* at 5a-6a. The court further held that "[t]here is no indication that either party intended to buy or sell anything other than the containers themselves." *Id.* at 6a.

The court of appeals also rejected petitioners' argument that 40 U.S.C. 484(d) and the applicable Defense Department Manual required that the sales contract include both the containers and their contents. Pet. App. 6a-10a. Relying on the statute's "plain language," the Federal Circuit ruled that Section 484(d)'s "conclusive presumption regarding title only

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[3] The court also found that the government was acting in its proprietary, rather than sovereign, capacity in conducting the sale of surplus property. Pet. App. 22a-23a.

applies to the property which the instrument purports to transfer," which in this case was limited to the containers. *Id.* at 8a-9a. The court similarly rejected petitioners' argument based on the Defense Department Manual's provision stating that the government makes "no warranty express or implied as to the quantity, kind, character, quality, weight, size, or description of any of the property." *Id.* at 6a, 44a. That disclaimer, the court explained, "simply precluded the purchaser from alleging a breach of contract if the goods failed to accurately match their description." *Id.* at 6a.

Finally, the court of appeals sustained the holding of the Court of Federal Claims that it lacked jurisdiction over petitioners' breach-of-contract claim. *Id.* at 10a-15a. Petitioners do not challenge that holding in this Court.

ARGUMENT

The court of appeals' decision is correct, does not conflict with the decision of any other court, and is based upon the application of settled legal principles to the specific facts of this case by the appellate court that Congress has entrusted to review government contract disputes. See 28 U.S.C. 1295(a)(3) & (10); 41 U.S.C. 609. Further review of this case is therefore not warranted.

1. a. Petitioners do not argue that the court of appeals' decision is contrary to any ruling of this Court. Petitioners contend (Pet. 8-10), however, that the court's decision conflicts with the Ninth Circuit's decision nearly fifty years ago in *United States* v. *Jones*, 176 F.2d 278 (1949). They are mistaken.

First, *Jones* involved a breach-of-contract claim, not a Just Compensation Clause claim. 176 F.2d at 279. The opinion thus did not address the issue presented by

the petition or decided by the court of appeals in this case. While petitioners did raise a contract claim below, that claim was dismissed for lack of jurisdiction (Pet. App. 10a-15a; 37 Fed. Cl. 256, 260-263), and petitioners have not sought further review of that dismissal or of the merits of their contract claim.

Second, *Jones* arose in a distinctly different factual context. In *Jones*, the goods at issue "clearly were within the scope of the sales contracts involved." Pet. App. 8a. The declarations described the property accurately and fully. *Jones*, 176 F.2d at 282. The contract, moreover, was for the "the residue of unsold items" in a shipyard. *Ibid.* Unlike the present case, the dispute in *Jones* thus did not concern what property the bill of sale "purport[ed] to transfer title or any other interest in," 40 U.S.C. 484(d). Instead, the issue was whether lack of authority or mistake would void a contract that explicitly embraced the property at issue. *Jones*, 176 F.2d at 288-290.[4]

Because *Jones* decided a different legal issue against a different backdrop, there is no basis for concluding that, a half-century later, the Ninth Circuit would decide the present case any differently than did the Federal Circuit.

b. Petitioners' contention (Pet. 9-10) that the court of appeals' ruling conflicts with *Pacific Harbor Capital*,

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[4] In addition, *Jones* interpreted a somewhat differently worded predecessor to 40 U.S.C. 484(d). *Jones*, 176 F.2d at 288-290 (discussing Section 25 of the War Surplus Property Act of 1944, Pub. L. No. 457, ch. 479, § 25, 58 Stat. 780 (repealed 1949)). The text of the 1944 Act addressed the disposition of government "property," while Section 484 applies to "surplus property." The transmissions at issue here are not "surplus property." *United States* v. *J & E Salvage Co.*, No. 92-162-Civ-4-H, slip op. at 3 (E.D.N.C. Aug. 19, 1994).

Inc. v. *Department of Agriculture*, 845 F. Supp. 1 (D.D.C. 1993); *East Tennessee Iron & Metal Co.* v. *United States*, 218 F. Supp. 377 (E.D. Tenn. 1963); *Turney* v. *United States*, 115 F. Supp. 457 (Ct. Cl. 1953); and *Appeal of Gonsalves*, A.S.B.C.A. No. 31874 (Mar. 10, 1986) (Pet. App. 41a-43a), does not warrant this Court's review.

First, conflicts with district court and administrative decisions are better policed, in the first instance, by the courts of appeals. Indeed, the Federal Circuit's decision here conclusively resolves any supposed conflict with the Court of Claims' ruling in *Turney* and the Armed Services Board of Contract Appeals' decision in *Gonsalves*. See 41 U.S.C. 607(g)(1).

Second, *Pacific Harbor*, *East Tennessee*, and *Gonsalves* all involved breach-of-contract-claims, not Just Compensation Clause claims. *Pacific Harbor*, 845 F. Supp. at 3-5; *East Tennessee*, 218 F. Supp. at 378-379; *Gonsalves*, Pet. App. 43a. While *Turney* did address a just compensation claim, the government there used military troops and a threatened embargo in a foreign country to compel surrender of property explicitly conveyed by the sales contract. 115 F. Supp. at 459-460, 463. That decision is thus of little help in analyzing the issue presented in this case, where the government acquired possession of property for which it claims title due to petitioners' voluntary compliance with a court order and a settlement agreement. See *Erosion Victims of Lake Superior Regulation* v. *United States*, 833 F.2d 297, 300 (Fed. Cir. 1987) (*Turney* turned upon a finding that the government exerted "substantial, direct involvement in view of then-pervasive United States military and economic presence" in the Philippines).

Third, in each of the cases petitioners cite, the property at issue was clearly encompassed by the sales contract. *Pacific Harbor*, 845 F. Supp. at 2 (bills of sale clearly covered exchange of planes; only issue was authority of agency to undertake the trade); *East Tennessee*, 218 F. Supp. at 378 (items sold were expressly described as "Building w/ contents"); *Turney*, 115 F. Supp. at 458 (property sold was described as all Army Air Force supplies at a specified air depot); *Gonsalves*, Pet. App. 42a (containers being sold bore labels identifying their contents, the purchaser knew the containers had contents, and the purchaser bid accordingly).

2. The decision of the court of appeals is correct. No taking occurred because the contract at issue did not convey the transmissions to petitioners. To present a viable claim under the Just Compensation Clause's mandate that "private property [shall not] be taken for public use, without just compensation" (U.S. Const. Amend. V), a plaintiff must first establish the existence of a property interest in the matter in dispute. *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992); see also *Phillips* v. *Washington Legal Found.*, 118 S. Ct. 1925 (1998). The contract documents in this case clearly described the items sold as shipping and storage containers, not the helicopter transmissions that had been inadvertently left inside the containers.[5] Nothing in the relevant papers indicated that the

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[5] Petitioners assert (Pet. 7) that there was no evidence in the record that the transmissions had been left in the containers inadvertently. The declarations of two contracting officials (see C.A. App. A177, A200-A201), however, supported the Court of Federal Claims' factual determination in that regard. 37 Fed. Cl. at 265.

contents of the containers, if any, would also be conveyed.

Petitioners' reliance on 40 U.S.C. 484(d) (Pet. 8-11) is misplaced. That provision states that a document "purporting to transfer title * * * in surplus property * * * shall be conclusive evidence of compliance with the provisions of this subchapter." In this case, Section 484(d) "does not create any presumptions regarding title to the transmissions because they were not mentioned either explicitly or implicitly in the contract documents." Pet. App. 9a. In other words, the sale documents did not "purport[] to transfer title" to the transmissions, 40 U.S.C. 484(d); their express terms transferred title only to the storage and shipping containers. See also 37 Fed. Cl. 264-266.

Petitioners also argue (Pet. 11) that Section 484(d) requires a presumption of compliance with all Defense Department Manual requirements, including the requirement that shipping and storage containers be certified as empty before disposal (see *id.* at 123a). The text of the statute, however, limits the presumption to compliance "with provisions of this subchapter." 40 U.S.C. 484(d).

In any event, it is "axiomatic that there is no taking where, pursuant to court order, the government is in possession of property to which it asserts a claim of rightful ownership." *DSI Corp.* v. *United States*, 655 F.2d 1072, 1074 (Ct. Cl. 1981). That is particularly true when, as here, the party invoking the Just Compensation Clause entered into and executed a voluntary agreement with the United States to reconvey the property in light of that court order. See C.A. App. A96-A97.

3. The petition does not present a Just Compensation Clause issue that is of general significance. In fact,

petitioners' claim sounds in contract, not Fifth Amendment, terms. As the Fourth Circuit explained in the initial stage of this litigation:

> The merits question presented is one of contract interpretation, *i.e.*, did the bill of sale and the accompanying [Defense Reutilization and Marketing Office] sales pamphlet allow a transfer of ownership of the hidden transmissions along with the containers purchased at the auction. This is a classic "scope of the contract" issue. * * * Every aspect of this case relates to these contract questions. All the evidence gathered during the discovery process deal with the documents generated during the sale, the conduct of the auction, and the authority of the [Defense Reutilization and Marketing Office] to enter into sales contracts. Furthermore, the dispute involves issues of custom and practice in government auctions. * * * The contract between the parties is the alpha and omega of this dispute.

Pet. App. 35a-37a. All but one of the cases on which petitioners rely (*Jones*, *Pacific Harbor*, *East Tennessee*, and *Gonsalves*, *supra*), moreover, were contract cases, not Just Compensation Clause decisions. The courts below ruled, and petitioners no longer dispute, that they (and thus this Court) lack jurisdiction to adjudicate petitioners' contract claim, because petitioners failed to comply with the requirements for presenting such a claim to the contracting officer in the first instance. Pet. App. 10a-15a; 37 Fed. Cl. at 260-263. That jurisdictional bar weighs against review by the

Court to consider what is essentially a breach-of-contract claim under the guise of a takings claim.[6]

In addition, the dearth of authority invoked by petitioners demonstrates the infrequency with which any issue of this sort arises or is left unresolved by the contract disputes process. Moreover, the unusual facts of the present case—where the government acquired possession of the property due to the petitioners' compliance with a court order and pursuant to a voluntary settlement agreement under which petitioners transferred title in the containers housing the transmissions back to the United States—indicate that further review would provide little guidance to other courts in other Just Compensation Clause cases.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1998

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[6] Indeed, because the government provided petitioners an avenue for seeking redress of their contract claim (which they did not properly pursue), even had there been a taking, it would not have been without just compensation. See *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 194-197 (1985).

Supreme Court, U.S.
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No. 97-2080

In The

Supreme Court of the United States

October Term, 1997

J & E SALVAGE COMPANY, JOHN DARLINGTON and THERESA N. DARLINGTON, Executrix of the Estate of EDWARD DARLINGTON,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF FOR PETITIONERS

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FURTHER REASONS FOR GRANTING THE WRIT

I

One of the major fallacies in the government's position in this case is revealed in its formulation of the "Question Presented", which states as follows:

> Whether the government's refusal to return helicopter transmissions that were inside containers that petitioners purchased at auction as surplus property constitutes a taking under the Just Compensation Clause of the Fifth Amendment, where the transmissions came into the government's possession pursuant to court order.

The "court order" by which the government came into possession was a "court order" entered by a "court" which had no subject matter jurisdiction. *United States v. J&E Salvage Co.*, F.3d 985, 990 (4th Cir. 1995) (Pet. App. E). This Court has never hesitated to hold that orders entered by courts lacking jurisdiction are not merely voidable but in fact are void even prior to their reversal. *Vallely v. Northern Fire & Marine Ins. Co.*, 254 U.S. 348 (1920). Indeed in *Burnham v. Superior Court of California*, 495 U.S. 604 (1990), Justice Scalia recounted the history of the proposition.

> The proposition that the judgment of a court lacking jurisdiction is void traces back to the English Year Books, see *Bowser v. Collins*, Y.B.Mich. 22 Edw. 4, f. 30, pl. 11, 145 Eng. Rep. 97 (1482), and was made settled law by Lord Coke in *Case of the Marshalsea*, 10 Co.Rep. 68b, 77 Eng. Rep. 1027, 1041 (K.B. 1612). Traditionally that proposition was embodied in the phrase coram non judice, "before a person not a judge"- meaning, in effect, that the proceeding in question was not a judicial proceeding because lawful judicial authority was not present, and could therefore not yield a judgment. American courts invalidated, or denied recognition to, judgments that violated this common-law principle long before the Fourteenth Amendment was adopted.

495 U.S. at 608-9.

Thus, when petitioners were forced by threat of imprisonment to relinquish possession of the transmissions, under the doctrine "corum non judice" they were not complying with a lawful order of a constitutionally authorized court, but rather were simply acquiescing to the demands of a person who, without legal authority, nevertheless had the power to bring down the wrath of the federal government upon them if the petitioners did not do what he told them to do. The United States of America can claim no immunity by virtue of his order and it ill-behooves it to attempt to do so.

II

The government attempts to take the "breach of contract versus the just compensation" issue argument in this case and stand it on its head. Had the government acted properly at the beginning of this case, the government would have filed a claim under the Contract Disputes Act as mandated by that act. However, rather than doing so, it filed suit in the Eastern District of North Carolina, which it knew or should have known lacked subject matter jurisdiction. The District Court, which lacked subject matter jurisdiction, ordered petitioners, on pain of imprisonment, to surrender the transmissions. The government took the transmissions and refused to return them when it was formally adjudged that the order under which it had gained the transmissions was void. Thus, the manner in which it gained the transmissions was no more legal than if it had simply sent a battalion of Marines to petitioners' business and demanded the transmissions at gunpoint.

Now, in what can only be described as the height of hypocrisy, the government criticizes petitioners for not properly seeking a so-called remedy under the Contract Disputes Act. However, by the time the government refused to return the transmissions, the question was no longer one arising under the Contract Disputes Act. Rather, it was a question of a taking, essentially a theft, and the issue that remained was whether petitioners were to be compensated as the Fifth Amendment promises.

The government's attempt, therefore, to distinguish *United States v. Jones*, 176 F.2d 278 (1949), is vacuous. In *Jones*, the property in

question remained with the purchaser. The government did not remove it from the purchaser's possession by a show of force as it did here. Thus, there was no taking.

Similarly, the government's attempt to distinguish § 25 of the War Surplus Property Act of 1944 from 40 U.S.C. § 484(d) is futile on both legal and factual grounds. As petitioners showed in the original Petition for Writ of Certiorari, the court in *Pacific Harbor Capital, Inc. v. Department of Agriculture*, 845 F. Supp. 1 (D.D.C. 1993) held that "the addition of the word surplus to the language of the statute was without effect." Moreover, as a factual matter, the government has never made any showing that the transmissions in question were not surplus as a matter of fact, notwithstanding the government's lukewarm protestations to the contrary.[1]

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1. At footnote 5 on page 9 of the Brief in Opposition the government alleges that "The declarations of two contracting officials (*see* C.A. App. A177, A200-A201), however, supported the Court of Federal Claims' factual determination" . . . with regard to whether or not the transmissions had been left in the containers inadvertently. Actually, one of the declarations, that of John C. McMahon, simply says that to the best of his knowledge and belief no DRMO employee knew that the containers had anything in them and that DRMO had no intention or authority to sell any transmissions at the auction in question. The declaration of McMahon "begs the question" as to knowledge and intent in view of the regulations contained in Appendix H which require that all containers be inspected for contents prior to being offered for sale.

Similarly, the declaration of Frank Zito at page 200 and 201 of the Court of Appeals appendix says that to his knowledge and belief "no one at the DRMO knew that any of the containers had anything inside them and that DRMO had no intention to sell or authority to sell the transmissions." However, for purposes of petitioners' title to the transmissions, 40 U.S.C. § 484(d) ensures the petitioners that the regulations were followed and the containers were thoroughly inspected before they were put up for sale. As petitioners have continuously argued throughout this litigation, and the lower courts have almost universally held in prior cases, if the government is allowed to claim that the sale of surplus property was made without authority or by mistake, then title to the property purchased will never be secure. Thus, the marketability of surplus property will be drastically impaired.

III

The government's argument that "conflicts with district court and administrative decisions are better policed, in the first instance, by the court of appeals" is empty because in all instances, *e.g. Pacific Harbor Corp., supra, East Tennessee Iron & Metal Co. v. United States*, 218 F. Supp. 377 (1963); *Turney v. United States*, 115 F. Supp. 457 (Ct. Cl. 1953), and *Appeal of Gonsalves*, A.S.B.C.A. No. 31874 (Mar. 10, 1986),[2] the United States lost in the courts cited and did not appeal the decisions. Indeed, the United States acquiesced in the holdings cited which were favorable to petitioners, and then in the present case has attempted, and thus far succeeded, in making an end-run around the established law.

IV

Indeed, the depths to which the United States is willing to sink in its attempts to cheat the petitioners in this case is shown by its reliance on the "Limited Settlement Agreement" in this case. (Opp. Brief p.3). This document, which was never filed in any court and which the respective attorneys in the United States District Court in the Eastern District of North Carolina agreed would never be made public unless the government won in the Fourth Circuit Court of Appeals, reflected petitioners' willingness to avoid having the government go to unreasonable trouble and expense in carrying out the order of surrender of the transmissions which had been entered by the Judge in the District Court. Transferring the heavy and unwieldy transmissions from the containers, which were indisputably the property of the petitioners, into new containers would have been a daunting task, requiring considerable equipment and manpower. In order to accommodate the government, petitioners simply agreed to trade containers, and the government agreed that, in the event petitioners won on appeal, it would trade the containers back. The settlement agreement became moot when the Fourth Circuit held that what had transpired in the Eastern District of North Carolina was moot, since the order which the District Court had entered was void.

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2. As petitioners pointed out at page 6 of the original Petition for Writ of Certiorari filed in this case, the facts in the *Gonsalves* case were virtually identical with the facts in this case. Why the government chose not to appeal *Gonsalves* if it believed that holding to be wrong is a mystery to petitioners.

V

The government, following the line of the Federal Circuit in the opinion below, relies heavily on the "scope of the original sales contract" and says that the transmissions were not within the "scope of the contract." However, the question presented here does not deal directly with what the scope of the contract was. Rather, it deals with what the "*scope of the bill of sale*" was. In surplus sales, the description of the property contracted for means very little because the government does not warrant the description of the property. All property is sold "as is/where is." *See*, "Sale of Government Property, General Sales Terms and Conditions" No. 2, Appendix G.

As petitioners have pointed out throughout this litigation, there is no language in 40 U.S.C. § 484 that requires that the property protected by that section be particularly described by the bill of sale or other instrument purporting to transfer title. If the containers in question here had been full of dirt, then petitioners would not have been able to make a claim against the government for the excess cost of transporting the containers. Had the transmissions in fact been worthless as the government thought they were at the time that it decided to sell them, the petitioners would have been forced to dispose of the transmissions at petitioners' expense.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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